Boston College Law Review

Volume 42
Issue 2 *Number 2*

Article 2

3-1-2001

Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System

Michael Edmund O'Neill

ABRAHAM'S LEGACY: AN EMPIRICAL ASSESSMENT OF (NEARLY) FIRST-TIME OFFENDERS IN THE FEDERAL SYSTEM

MICHAEL EDMUND O'NEILL*

Abstract: Congress has expressly directed the United States Sentencing Commission to ensure that the federal sentencing guidelines make allowances for sentences other than imprisonment for certain first-time offenders. The aim of this Article is to demystify the criminal history categories used in that process, to create a working definition of the "first-time federal offender," and to establish whether, as an empirical matter, such individuals are commonly imprisoned in federal correctional facilities. The data shows that a substantial number of offenders who have no prior convictions are lumped together with offenders who may be recidivists or who may have prior violent felonies. This Article proposes modifications to the criminal history categories, recommending the establishment of a guided downward departure for *true* first-time offenders, or, in the alternative, creating a new criminal history category for those same offenders.

INTRODUCTION

In the book of Genesis, the Lord informs the great patriarch Abraham that He intends to destroy the cities of Sodom and Gomorrah because of the inhabitants' wickedness.[1] Abraham, however, casts himself as the cities' apologist and seeks to defend them against God's wrath. "Peradventure there be fifty righteous within the city:" Abraham inquires of the Lord, "wilt thou also destroy and not spare the place for the fifty righteous that are therein?"[2] Abraham bargains with God, endeavoring to spare the cities if but a few righteous men could

 The views expressed herein are my own. They neither reflect the policy nor the official positions of the United States Sentencing Commission; thus any errors are attributable solely to me. I would like to thank Will Consovoy and Thomas McCarthy for their helpful research assistance, as well as Linda Maxfield, Courtney Semisch, and Kristine Kitchens for their efforts to check the statistical tables.

[1] *Genesis* 18:20 (King James).

[2] *Id.* 18:24.

be unearthed.[3] Abraham, of course, was unable to find those upright men.

Abraham was concerned that in the punishment of the many, a few good individuals might be unjustly treated. The desire to separate those deserving of mercy from those meriting punishment is a human trait, and one that is—at least in some respects—built into our criminal justice system. Human intuition, expressed in our legal norms, tells us that first-time or otherwise low-level offenders *ought* to be treated differently from those who repeatedly offend. While not yet as precise in predicting future recidivism as might be preferred, recent social science literature suggests that recidivists ought to be targeted and that first-time offenders may merit punishment that is less severe than those already hardened to the realities of the criminal justice system.[4] Those social science findings have been echoed by political leaders seeking to focus law enforcement efforts on the most hardened and dangerous offenders.[5]

Popular press reports have been replete with stories suggesting that the federal prison system is overpopulated by so-called first-time, low-level drug offenders.[6] Indeed, stories of seemingly "innocent" first-time offenders caught up in the "system" and relegated to spend the next however many years of their lives locked up with more serious offenders never fail to elicit (as they should when accurately reported) a sympathetic response.[7]

Claims of this sort (both factual and illusory) must not be dismissed summarily. After all, such assertions serve to mold public opinion and to inform the public's understanding of the federal sentencing system. This public perception of federal sentencing's fairness is important because it affects the system's legitimacy. In terms of its popular legitimacy, the system's *apparent* fairness is in some respects nearly as important as its *actual* fairness. Recognizing this fact, the

---

[3] *Id.* 18:26–33.

[4] *See, e.g.*, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 83–87 (Alfred Blumstein ed., 1983).

[5] Letter from U.S. Senator Jeff Sessions to the Diana Murphy, Chair, U.S. Sentencing Commission (July 13, 2000) (on file with author).

[6] *See, e.g.*, Ed Timms, *Drug War Targets Blacks, Report Says: They're Sent to Prison on Charges at Higher Rates than Whites, Human Rights Watch Finds*, DALLAS MORNING NEWS, June 8, 2000, at 6A.

[7] *See* Nina Bernstein, *Is Get-Tough Sentencing Unfair to Women?*, MINNEAPOLIS STAR TRIB., Aug. 25, 1996, at 12A; Libby Copland, *Kemba Smith Granted the Gift of Freedom, Clinton Commutes Sentence in Publicized Drug Case*, WASH. POST, Dec. 23, 2000, at C1.

Sentencing Reform Act of 1984 (the "SRA"),[8] requires the United States Sentencing Commission (the "Sentencing Commission") to consider public opinion in setting offense levels.[9] Whether or not popular press stories accurately portray federal sentencing efforts, however, they may significantly fashion the public debate. And popular perceptions inevitably filter through to elected officials, who in turn, direct the Sentencing Commission to do "something" to combat the crime *du jour*. As a consequence, despite the notorious difficulty in capturing public opinion with respect to sentencing concerns,[10] much of the Sentencing Commission's work is driven by public sentiment—whether directly expressed or indirectly funneled through their duly elected representatives. To this end, it is vital for the Commission to provide accurate data and information to Congress and to the public at large to inform public debate and to shape public sentiment. Seldom, however, is the Sentencing Commission asked to *reduce* a penalty in response to a feeling that a crime or category of criminal is being over-punished. Yet, this may be an important consideration when considering the appropriate level of punishment for first-time offenders.

Congress has expressly directed the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[11] The challenge is whether this congressional directive has been effectuated. As a consequence, the aim of this article is to demystify the criminal history categories, which are of great significance to the federal sentencing scheme, to create a working definition of the "first-time federal offender," and to establish whether, as an empirical matter, such individuals are commonly imprisoned in federal correctional facilities.

Part I provides a background to the sentencing guidelines generally, and the criminal history categories in particular. Part II assesses the characteristics common to Criminal History Category I offenders, and analyzes the nature of their prior convictions—both those that have been included for criminal history purposes and, more importantly, those that have been excluded from consideration. The data

---

[8] Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837.

[9] 28 U.S.C. § 994(c)(4)–(5) (1994).

[10] *See, e.g.*, Deirdre Golash & James P. Lynch, *Should Public Opinion Guide Sentencing Policy?*, 12 FED. SENTENCING REP. 30, 31–32 (1999).

[11] 28 U.S.C. § 994(j) (1994).

exposes that a substantial number of offenders who have no prior convictions or reported contact with the criminal justice system are lumped together in Criminal History Category I with offenders who may be recidivists or who may have prior violent felonies. Indeed, the data shows that there are a number of past offenses, excluded from the criminal history computation, that nevertheless may contain either important indicia of violence or may demonstrate recidivist behavior on the part of certain offenders. The data suggests that certain offenses ought not to be excluded from the criminal history calculation. On the other hand, there may be offenses currently scored for criminal history purposes that are neither serious in nature, nor good predictors of future criminal conduct.

Finally, in Part III, I suggest possible modifications to the way in which the criminal history categories are constructed, recommending the establishment of a guided downward departure for true first-time offenders, or, in the alternative, creating a new criminal history category for those same offenders. In addition, I offer the possibility of reconfiguring the criminal history categories to reflect the nature of the prior offense, rather than merely relying upon the previous offense's sentence length as a proxy for dangerousness. Similarly, I suggest that certain offenses that are presently excluded might be retained if they contain certain elements of dangerousness or if they consist of repeat offenses. To better reflect society's concern with recidivism and to capture repeat offenders, current rules of exclusion for certain prior offenses may be inadequate and thus may need to be reconceptualized. Particularly dangerous offenses, for example, even if they are relatively old, may nonetheless be poor candidates for exclusion from criminal history. Before examining these considerations, however, let us first turn to a few important background considerations.

I. Background Considerations

A. *Why Do We Care About First-time Offenders?*

In the past decade, the total local, state and federal prison population in the United States has increased by over sixty percent and now approaches nearly two million inmates.[12] During this same time

[12] Allen J. Beck, *Prison and Jail Inmates at Midyear 1999*, Bureau Just. Bull., Apr. 2000, at 2 (U.S. Dept. of Just.).

period, the crime rate has fallen to a twenty-six year low.[13] Indeed, although the public's fears concerning crime victimization have been commonly exploited in the nation's political discourse, there is some evidence that the public's concern with personal security has abated.[14] As a consequence, policymakers are in a better position to reconsider thoughtfully current sentencing policy to ensure that we are both targeting the appropriate individuals and getting the most efficient punishment for our expenditure of public monies. While considerable debate rages over whether America's stepped-up incarceration rates have had any impact upon falling crime rates,[15] there has been increased concern across the political spectrum both over the absolute number of offenders behind bars, and whether we are imprisoning the "right" people. What constitutes the "right" offenders, of course, is a matter of considerable debate. Generally, it is agreed that the "right" people to be placed behind bars tend to be violent, repeat offenders who prey upon society.

On the other end of the criminality scale, however, there is generally an impulse to treat first-time offenders differently from those who, although they may have committed the exact same crime, nonetheless have an extensive criminal past. The desire to give a break to first-time offenders often springs from the same human desire to allow people the opportunity to be rehabilitated and the wish to have them rejoin society. This desire to be merciful to first-time offenders makes a certain amount of political sense as well; it is doubtless preferable to reintegrate a first-time (or otherwise low-level) offender into the community than to incarcerate that individual. Aside from the capital costs of prison, there are important human costs; namely,

---

[13] *Id.*; President's Radio Address, 37 WEEKLY COMP. PRES. DOC. 112113 (Jan. 22, 2001); Mark Arner, *Crime Rate Falling in this Country and in U.S.*, SAN DIEGO UNION-TRIB., Oct. 16, 2000, at A1; Eric Lichtblau, *A Narrow Win for Ashcroft Cabinet*, L.A. TIMES, Feb. 2, 2001, at A1.

[14] As of this writing, we are past the 2000 election cycle and can observe that crime fears played virtually no part in the presidential election debates. *See, e.g.*, Karin Scholz & John F. Hagan, *Americans Safer as Crime Decreases Again, FBI Reports*, CLEV. PLAIN DEALER, Oct. 16, 2000, at 1A.

[15] *See* Brooke A. Masters, *Allen Takes Credit for Crime Drop; Robb Disagrees*, WASH. POST, Oct. 19, 2000, at B1 (suggesting that increased imprisonment yields decreased crime). *But see* Lorraine Adams & David A. Vise, *Crime Rates Down for the 7th Straight Year; Experts Disagree About Reason for Drop and the Meaning of Conflicting Trends*, WASH. POST, Oct. 18, 1999, at A2; Fox Butterfield, *Inmates Serving More Time, Justice Department Reports*, N.Y. TIMES, Jan. 11, 1999, at A10. For an analysis of this on-going debate, see William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 420–422 (2000).

stigmatizing the offender in such a way as to impede his ability to become socially productive.[16] It has yet to be demonstrated that prison has much of a rehabilitative effect upon offenders—although selective incapacitation surely works—and because most first-time offenders serve less time behind bars, it may well be preferable to minimize their prison time and maximize the time spent reintegrating them into society.

Moreover, targeted sentencing practices ensure that prison space is available for the most hardened, violent offenders. Such offenders are best kept isolated from society. The availability of prison space is ultimately limited by what the public and its elected representatives are willing to spend to keep those convicted of crimes locked up. Although there has generally been a binge of prison building over the past twenty years (and a significant drop in crime rates),[17] and the public has demonstrated some willingness to invest money in the creation of additional prison space, at some point, the marginal effect of each additional prison bed becomes increasingly negligible. That said, however, the difficulty is in determining what constitutes a *true* first-time offender, and whether such individuals are common within the federal criminal justice system. Before delving into that question, however, I would like to turn to a discussion of the federal sentencing guidelines and the way in which they treat prior criminal conduct.

B. *The Philosophy of Criminal History*

Despite the intuition that a first-time offender ought to be treated differently from a recidivist, should they be treated differently? After all, a case can readily be made that an individual should pay for his present acts, not his past—particularly if he has previously paid his debt to society. This preoccupation with a defendant's criminal past is not without considerable theoretical foundations. Indeed, whether an offender's criminal record—or lack thereof—should be a factor in determining an appropriate sentence for a current offense has been a matter of significant theoretical debate—a debate which extends back to the time of Aristotle and Plato.[18] Advocates for con-

---

[16] Nevertheless, under a cost-benefit analysis, the net cost to society is debatable, as the sunk costs of prison must be balanced against the savings in terms of crimes averted. *See* John DiIulio & Anne Piehl, *Does Prison Pay? Revisited*, 13 BROOKINGS REV. 1–20 (1995); TED R. MILLER, ET AL., NATIONAL INSTITUTE OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 9–24 (1996) (estimating costs of crime).

[17] *See* Spelman, *supra* note 15, at 419–20.

[18] *See generally* MARY M. MACKENZIE, PLATO ON PUNISHMENT (1981).

sidering a defendant's criminal past[19] when determining the appropriate punishment for a crime, have justified their claims on various grounds. Historically, retributivist and utilitarian theories of discipline have dominated discussions of appropriate punishment levels.[20] Dean Roscoe Pound observed long ago that there exists a "fundamental conflict with respect to aims and purposes" in punishment theory.[21] Each of those divergent philosophies—"those who think that punishment need only be inherently just, and those who think it cannot be justified without reference to its utility or expediency"—have significant implications for first-time (or other low-level) offenders.[22]

Traditionally, retributivists have argued for a significantly reduced role for criminal history in determining present levels of punishment. Proponents of so-called "just deserts" have sought to ensure fair punishment for the *present* offense, not for past crimes that already may have been punished. Richard Singer, for example, has argued that criminal history is inappropriate to consider at sentencing because the defendant has already been punished for the previous offense.[23] He has explained that a defendant's culpability is not increased because of having committed the prior offense; nor is the harm to the present victim any greater as a result of the prior offense.[24] As a consequence, it can be argued by implication that a first-time offender should be treated no differently from a hardened recidivist who has committed the same offense—each merits identical punishment.

Others espousing this retributivist notion of punishment have taken a slightly different approach. Andrew Von Hirsch has explained that criminal history should impact sentencing only to the extent that the defendant's culpability is enhanced due to his prior offenses.[25]

---

[19] The term "criminal history" is generally considered to include the defendant's prior, adjudicated criminal behavior, and does not as a rule consider unprosecuted crimes a defendant may have committed.

[20] *See, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1418 (2000) (citing Michael Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 179 (Ferdinand Schoeman ed., 1987)).

[21] Roscoe Pound, *Criminal Justice and the American City*, *in* CRIMINAL JUSTICE IN CLEVELAND 576 (Roscoe Pound & Felix Frankfurter eds., 1922).

[22] 3 ENCYCLOPEDIA BRITANNICA, GREAT BOOKS OF THE WESTERN WORLD: THE GREAT IDEAS SYNOPTICON 489 (1992).

[23] RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67–74 (1979).

[24] *See id.* at 68, 70.

[25] Von Hirsch is largely responsible for revival of the term "just desert." He has explained his rejection of the term "retribution" by observing that "[w]e do not find 'retribu-

Von Hirsch has argued that offenders who are being sentenced for their first offense have less culpability because they have not previously been punished. According to Von Hirsch, the first sentence communicates that the behavior is wrong and will not be tolerated. A sentence for a second violation can reflect the "full" weight of the law because the offender has been alerted previously to the unacceptability of the behavior.[26] Even so, Von Hirsch, like other retributivists, advocates only a narrow role for criminal history in determining an offender's sentence for a present offense.

Utilitarians, in contrast, adhere to the notion that punishment must be considered in the broader social context and thus have focussed more on the importance of general and specific deterrence and the use of incapacitation (selective and otherwise) in protecting the public and dissuading potential offenders from engaging in criminal activity.[27] Proponents of the utilitarian vision (to the extent a single view can be attributed to these theorists) have thus contended that incapacitation by the "imposition of more restrictive sentences on those defendants who have a greater likelihood of recidivism enhances the protection of the public from further crimes by those de-

---

tion' a helpful term. It has no regular use except in relation to punishment. . . . We prefer the term 'desert.' Its cognate, 'to deserve' is widely used. . . . The word 'desert' is somewhat less emotionally loaded." ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45–46 (1976). Retributive philosophies come in many guises. Professor Cottingham has usefully identified nine different (albeit closely related) theories that masquerade under the term "retributivism": (1) repayment theory (the offender repays his debt to society); (2) just desert theory (the punishment is deserved); (3) penalty theory; (4) minimalism (conscious guilt is a minimal condition of just punishment); (5) satisfaction theory (an offender's punishment satisfies the victims); (6) fair play theory (Kant and Rawl's theories of justice as fairness); (7) placation theory (punishment placates the community); (8) annulment theory (Hegel's position that punishment rights the wrong) (9) denunciation theory (punishment publicly denounces the crime). John Cottingham, *Varieties of Retribution*, 29 PHILA. Q. 238, 238–45 (1979).

[26] Von Hirsch has observed that: "The reason for treating the first offense as less serious is, we think, that repetition alters the degree of culpability that may be ascribed to the offender. . . . A repetition of the offense following that conviction may be regarded as more culpable." VON HIRSCH, *supra* note 25, at 85; *see also* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 77 (1985). Indeed, currently no guideline system completely disregards the defendant's prior record in the determination of sentence. However, some states do consider aspects of retributionist theory. Minnesota, for example, used this theory in a modified format by adjusting the slope of its imprisonment/non-imprisonment line to focus more on the current offense.

[27] There are numerous forms of utilitarian-based punishments. *See, e.g.*, THEORIES OF PUNISHMENT (Stanley E. Grupp ed., 1971); H. GROSS & A. VON HIRSCH, SENTENCING (1981).

fendants."[28] In other words, one of the few sure things that can be said about incarceration is that it prevents an individual defendant from offending again during the period of his incarceration—and may serve to deter him from future criminal conduct once released from prison. Analogously, it is hoped that stiff penalties will serve to deter other potential criminal actors from preying upon the public. Utilitarians support criminal history as a tool to fashion a current sentence that takes into account the likelihood of a defendant's propensity to commit offenses in the future, and that assesses a defendant's culpability for having previously been placed on notice that his conduct was wrong. In this regard, utilitarian theorists have pointed to sociological studies seeking to establish links between prior offenses and their ability to predict future misdeeds. From a classically utilitarian standpoint, it makes little sense to incarcerate an individual if that person has no prospect of engaging in further criminal conduct and if no general deterrence objectives are attained. On the other hand, if certain offenses are strongly predictive of future crimes—even if those offenses may not be particularly serious—then the predictive power of those crimes ought to be taken into account.

C. *Incapacitation and Criminal History*

Emerging, in part, from each of these philosophical notions underpinning sentencing policy is the theory of incapacitation. Often referred to as "limited just deserts," this approach, which takes two basic forms—collective and selective—advocates the expanded use of imprisonment to incapacitate offenders. Both forms assume that while offenders are in prison they will not be able to engage in further criminal behavior. In this sense, incapacitation really mirrors utilitarian peneological theory. Collective incapacitation seeks to prevent crime by increasing the rate and duration of imprisonment for a broad range of offenders, without a specific prediction of future criminality. While doubtlessly inefficient, in that more offenders are likely incarcerated than would re-offend, collective incapacitation reflects the general reluctance of policymakers to engage in predictions of future dangerousness, an effort that has long been viewed

[28] U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987), *reprinted in* PRACTICING LAW INSTITUTE, FEDERAL SENTENCING GUIDELINES 360 (1987).

with suspicion by legal academics,[29] but which is being re-thought in the social science community.[30]

In contrast, selective incapacitation seeks to prevent crime by using certain criteria to identify for restraint a smaller number of offenders who are predicted to re-offend. Of course, selective incapacitation can also serve to reduce punishment for persons who are predicted to be less likely to commit additional crimes. While predictive models have seldom been deemed reliable tools for ascertaining present punishment levels, they have been used for determining whether an individual should face involuntary civil commitment,[31] and, with the enactment of the 1984 Bail Reform Act ("BRA"), for assessing (in a limited way) the dangerousness of a criminal defendant for purposes of setting bail.[32] More recently, claims have been made that current predictive models represent a considerable advancement over models formerly used and are now far more reliable.[33]

First-time offender status, while not necessarily explicitly acknowledged as such, has long been used as something of a crude tool to assess the likelihood of recidivism. Thus, just as judges commonly used informal assessments of a defendant's presumed dangerousness prior to being explicitly authorized to do so in the 1984 BRA, they

---

[29] *See, e.g.*, Eli M. Rollman, *Supreme Court Review: "Mental Illness": A Sexually Violent Predator Is Punished Twice for One Crime*, 88 J. CRIM. L. & CRIMINOLOGY 985, 1013–14 (1998); Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 121–23 (1990); Mark David Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, CRIM. JUST., Winter 1989, at 21, 45.

[30] *See, e.g.*, David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 5–10 (David B. Wexler & Bruce Winick eds., 1991); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds., 1996); BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (1997). For examples of therapeutic scholarship, see Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 195–97 (1997); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 508 (1998); *see also* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 162 (1995).

[31] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 353–56, 371 (1996) (upholding civil commitment of individual).

[32] 18 U.S.C. § 3142 (1994).

[33] *See generally* AMERICAN PSYCHIATRIC ASSOCIATION, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 11–35 (1999); VERNON L. QUINSEY ET AL., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK (1998); Colleen K. Cannon & Vernon L. Quinsey, *The Likelihood of Violent Behavior: Predictions, Postdictions, and Hindsight Bias*, 27 CAN. J. BEHAV. SCI. 92, 94 (1995).

have been using first-time offender status as a rough means of predicting future dangerousness. The simple calculation is "if he's done it before, he's likely to do it again." To a certain degree, then, selective incapacitation has long been a factor in the criminal justice system.[34]

D. *The Federal Sentencing Guidelines and Criminal History*

Although the propriety of using past criminal behavior as a factor in determining an offender's present sentence has long been debated, it is generally agreed (at least among policymakers) that criminal history has at least some role to play in sentencing.[35] The original United States Sentencing Commission in fact determined that criminal history should be a major component in creating the sentencing guidelines. To this end, the Commission designed Chapter Four, *Criminal History and Criminal Livelihood,* as a means of capturing the frequency, seriousness, and recency of a defendant's prior criminal record.[36] The Commission ostensibly accepted that these past offenses could serve as reliable predictors of future criminal conduct, and, to a somewhat lesser degree, evidence that the offender had received notice regarding his illegal conduct. As such, the Commission determined that a defendant with a record of prior criminal activity is more culpable than a first offender and thus deserving of more serious

---

[34] States vary in their use of selective incapacitation. For example, in the Pennsylvania guidelines, all prior convictions are included in the computation of the criminal history score, although some offenses are weighed more heavily than others. Because the focus is on the number of prior offenses, little distinction is made between types of offenders. COMMONWEALTH OF PENNSYLVANIA COMMISSION ON SENTENCING, SENTENCING GUIDELINES IMPLEMENTATION MANUAL § 303.4(a) (4th ed. 1994); *see also* John H. Kramer & Cynthia Kempinen, *History of Pennsylvania Sentencing Reform,* 6 FED. SENTENCING REP. 152, 153 (1993); John C. Dowling, *Sentencing Discretion in Pennsylvania: Has the Pendulum Returned to the Trial Judge?,* 26 Duq. L. Rev. 925 (1988). In contrast, Oregon uses a typography classification of offenders that focuses not on the number of prior convictions, but, instead, the type of prior offenses committed with violent offenders and repeat non-violent felony offenders are targeted for longer sentences. Each prior conviction does not necessarily contribute to the criminal history score. Consequently, in many criminal justice systems, criminal history is seen as a crucial component of the determination of an offender's sentence because of its use as a predictor of future criminality. *See* U.S. SENTENCING COMMISSION, SELECTIVE INCAPACITATION (1994); *see also* Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model,* 25 U.C. DAVIS L. REV. 695, 705–707 (1992); Blake Nelson, *The Minnesota Sentencing Guidelines: The Effects of Determinate Sentencing on Disparities in Sentencing Decisions,* 10 LAW & INEQ. 217, 219 n.4 (1992).

[35] *See* 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, *supra* note 4, at 83–87.

[36] U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (1998).

punishment.[37] Conversely, the Commission decided that offenders who had no prior record merited less serious punishment. The Commission sought to capture that differentiation in its construction of the so-called criminal history categories.

1. Where Theory and Practice Meet: the United States Sentencing Guidelines

Before turning to the empirical findings regarding Criminal History Category I, it is important to review briefly the guidelines' structure. Prior to the adoption of the Sentencing Reform Act of 1984 ("SRA"),[38] federal sentencing was based largely on a "rehabilitative" or "medical" model, which considered criminal history less for purposes of punishment, and more as a means for evaluating criminality in an effort to develop an appropriate treatment regimen.[39] The enactment of the federal sentencing guidelines represented a seismic shift in sentencing practice and theory.[40] Elimination of disparity among defendants convicted of the same offense became the guidelines' holy grail. Sentences were no longer to be indeterminate, but rather to treat similarly situated defendants who commit identical offenses comparably.

To incorporate criminal history, the Sentencing Commission considered various philosophical arguments regarding the appropriate use of a prior record in determining a defendant's sentence.[41] The Commission did not, however, explicitly prefer one theoretical approach over the other. Rather, the Commission expressly identified aspects from several theoretical models in establishing so-called

---

[37] *See, e.g.*, H.R. REP. NO. 99-523-44, at 99 (1984) (report accompanying H.R. 6012, one of the sentencing guideline bills considered prior to passage of the Sentencing Reform Act of 1984) (observing that "those with previous criminal histories should be punished more severely than first offenders, because the level of culpability . . . is higher"); *see also* MODEL SENTENCING AND CORRECTIONS ACT § 3-109 (1978).

[38] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

[39] *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 5-10 (1981) (discussing the rise and fall of the "rehabilitative" ideal); PAMALA L. GRISET, DETERMINATE SENTENCING 11-12 (1991) (discussing the "rise of the rehabilitative juggernaut" between 1877-1970); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 305-09 (1993).

[40] *See, e.g.*, Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 300-08 (2000); GRIEST, *supra* note 39, 11-12.

[41] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36,ch. 4, pt. A, introductory cmt..

"criminal history categories."[42] These categories were designed to capture the frequency, seriousness, and recency of the defendant's prior record. The Commission concluded that these factors were reliable predictors of future criminal conduct. The Commission based its creation of the various criminal history categories largely on "extant empirical research assessing correlates of recidivism and patterns of career criminal behavior."[43] The Commission did not, however, conduct independent empirical assessments to determine the reliability of the chosen factors. Rather, these claims of predictive power were based on factors similar to those included in two well-known predictive devices, namely the United States Parole Commission's "Salient Factor Score" ("SFS"),[44] and the so-called "Inslaw Scale for Selecting Career Criminals for Special Prosecution."[45] Using the SFS as its point of departure, the original Sentencing Commission explained that:

> A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.[46]

The Sentencing Commission's stated basis for the creation of the criminal history categories demonstrates its blending of the various theoretical approaches—not unsurprising given the fact that the guidelines are not merely an academic's fancy, but the result of political compromise brokered among competing interests.[47] The Commis-

---

[42] *See id.*

[43] *Id.*

[44] The Parole Commission has used the SFS since 1972 to predict recidivism and guide parole decisions. *See, e.g.*, Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission's Salient Factor Score*, 22 J. CRIM. JUST. 477, 477–78, 485–87 (1994); Peter B. Hoffman & James L. Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. CRIM. JUST. 195–206 (1974).

[45] *See* U.S. SENTENCING COMMISSION, *supra* note 28, at 361.

[46] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, ch. 4, pt. A, introductory cmt. (1998).

[47] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15–20 (1988).

sion nevertheless planned to "review additional data insofar as they become available in the future" to monitor the guidelines' effectiveness.[48] Despite that well-meant intention, the original Commission's determination has remained largely unchanged since the guidelines' inception.[49]

2. Basics of the Criminal History Category Score

Essentially, the federal sentencing guidelines utilize two numerical scores to determine a criminal offender's sentence. The first, the offense level, represents the guidelines' determination of the offense seriousness on a scale ranging from level one to level forty-three. The second, the criminal history category, catalogues the prior criminal history of the offender into one of six categories of increasing conviction frequency. Criminal history is thus used as a central component of the federal sentencing guidelines to reflect the understanding that repeat offenders have increased culpability, are more likely to recidivate, and require selective targeting as potentially dangerous offenders. The six criminal history categories result from a grouping of points assigned to each prior conviction meeting the guidelines' inclusion criteria. Based solely upon the prior imposed sentence's length, included convictions are assigned one, two, or three points.

As previously observed, the federal sentencing guidelines are unique in their approach to criminal history in that they equate the severity of the prior offense with the length of the sentence imposed for the previous conviction—something no other sentencing guidelines quite do. The guidelines allocate three points for each sentence greater than thirteen months, assign two points for a sentence of sixty days, and reserve one point for all other sentences.[50] In addition, up to three points may be assigned if the defendant was under a criminal justice sentence at the time the current offense was committed, and had been released from a sentence of imprisonment within two years

---

[48] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, ch. 4, pt. A, introductory cmt. (1998).

[49] Indeed, aside from the occasional conforming amendment or technical clarification, the only significant revision in the criminal history category was added in 1991— a sixth computation element to ensure that any violent crimes otherwise uncounted would be included in criminal history. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.1(f).

[50] *Id.* § 4A1.1(a)–(c).

of the commencement of the instant offense.[51] Counterintuitively, an offender who has had no prior contact with the criminal justice system is nevertheless placed in the same criminal history category as those who have been assigned a single point, and those who, while technically "zero-pointers," may nonetheless have uncounted criminal pasts.

The rate of increase in severity among the criminal history categories is carefully balanced. The Sentencing Commission fashioned the criminal history categories so that the rate at which a sentence increases from Criminal History Category I to Category II, or from Category II to Category III, is equivalent to a one-level increase in the base offense level. Reflecting the greater seriousness of more substantial criminal records, the Commission designated that a move from Category III to Category IV, Category IV to Category V, or Category V to Category VI, would represent a more Byzantine change in the offense level, because these categories include much broader ranges of criminal history points.[52]

Interestingly, the Sentencing Commission designed the criminal history categories in this fashion so that the relative increase is actually greater for less serious offenses. While this seems somewhat counterintuitive—the notion being that the increase in categories actually ought to be greater for more serious offenses—a system of this sort

---

[51] Pursuant to § 4A1.1(d), two points are added if the defendant committed any part of the present offense while under any criminal justice sentence. Two points are added under § 4A1.1(e) if the defendant committed any part of the present offense fewer than two years following release from imprisonment pursuant to a sentence counted under § 4A1.1(a) or (b). If two points are added under § 4A1.1(d), only one point may be added under § 4A1.1(e).

[52] While there is some variation in approach, almost every sentencing guideline system considers a defendant's prior record in the determination of the sentence. Most states measure both the number and seriousness of prior convictions. Some states weight prior convictions depending on their severity. Other systems use prior record categories that rely less on numerical scores or calculations and instead differentiate among types of offenders, such as those with violent prior convictions, those with multiple felony convictions, and so forth. The major advantage of differentiating by offender type is that the prior record categories are more uniform, providing each category with more similar offenders. Although the state systems vary by how they weigh prior record, they all assess points based on prior offense type ranked by severity. *See, e.g.*, Robert Batey & Stephen M. Everhart, *The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional*, 11 U. FLA. J.L. & PUB. POL'Y 5 (1999) (discussing Florida's "Safe Streets" Act); Kirkpatrick, *supra* note 34, at 705–07; Nelson, *supra* note 34, at 219 n.4.; Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention and Criminal Justice*, 114 HARV. L. REV. 1429, 1435 (2001) (discussing "3-Strikes" statutes); Miriam A. Cavanaugh, Note, *If You Do the Crime, You Will Do the Time: A Look at the New Truth in Sentencing Law in Michigan*, 77 U. DET. MERCY L. REV. 375, 387 (2000).

would thus more heavily penalize those at the top of the criminal history categories. The Commission, however, based its decision on sociological research indicating that the crime-preventive benefits of imprisonment decline with age. As a consequence, the Commission reasoned that "adding any given number of years to a five-year sentence, for example, is likely to be more effective in decreasing the overall level of crime than adding the same number of years to a twenty-year sentence."[53] In other words, the marginal benefit of adding more years to lengthen sentences at the top-end of the guidelines was thought to be small.

3. Exclusions from the Criminal History Score

As it is constructed, Criminal History Category I is an imprecise measure of prior criminality at least in part because it encompasses both those defendants who may have either one or no criminal history points. But is a Criminal History Category I, zero-pointer a true first-time offender? Maybe, maybe not. Not all prior convictions are included in the criminal history score computation. The guidelines specifically exclude certain prior offenses. For example, the decay factor excludes from the criminal history computation those crimes occurring a specified number of years prior to the instant of.[54] Similarly, many juvenile convictions,[55] foreign convictions,[56] and certain other minor, non-felony convictions are not included in the calculation of criminal history.[57]

The most common reason that a conviction is excluded from the computation is that it involved a minor, non-felony adjudication.[58] The next three most likely reasons for exclusion involve the age of conviction, the fact that it was a juvenile conviction, and crimes related to the present offense.[59] I would like briefly to discuss the Sentencing Commission's rationale for excluding these offenses.

---

[53] *See* U. S. SENTENCING COMMISSION, *supra* note 28, at 362.

[54] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.2(e).

[55] *Id.* § 4A1.2(d).

[56] *Id.* § 4A1.2(h).

[57] *Id.* § 4A1.2(c).

[58] Such minor convictions, which are never counted for purposes of the criminal history score, include: hitchhiking, loitering, truancy, vagrancy, minor traffic violations, etc. U.S.S.G. 4A1.2(c)(2).

[59] The median number of years between the instant offense sentencing date and the convictions excluded for decay factor is sixteen.

a. *The Decay Factor*

It is a general maxim that "time heals all wounds." So it is with past criminal conduct. Sentencing theorists generally assume that the relevance of a prior offense dwindles over time. A mistake in the past, particularly when a significant amount of time has elapsed without any further criminal activity, is generally viewed as the best means of determining whether an individual has been rehabilitated. In keeping with this understanding, the Sentencing Commission opted to limit the impact of "decayed" prior convictions by relegating them into five different applicable time periods for the purpose of assessing criminal history points. These time periods are dependent both upon the length of the previously imposed sentence as well as the defendant's age when he committed the earlier offense.[60]

The Sentencing Commission's treatment of this factor differs markedly from the Parole Commission's SFS. The SFS considers both the defendant's "age" and "history of drug abuse" because it deemed both of these factors to be relevant in predicting recidivism.[61] The Sentencing Commission, however, chose not to rely upon a factor's predictive power, but rather wanted to include only factors that could be supported by both a retributivist and predictive rationale.[62] As a result, the Sentencing Commission declined to include age and drug abuse in the criminal history categories and instead opted to construct the decay criteria that in many ways act as a proxy for the defender's age at the time of conviction.[63]

---

[60] State guideline systems vary in their use of applicable time periods. States that limit consideration of offenses generally use one applicable time period for all offenses. The District of Columbia is the only system similar to the federal system in that it has several different time periods. In the District's system, the applicable time period depends upon whether the prior offense was a felony, misdemeanor, or juvenile adjudication. Some states that do not restrict the time period in which prior offenses can be counted instead, have "crime-free" periods from which the defendant benefits. In these states, if the defendant remains "conviction free" for a period of time (usually 10 or 15 years not including periods of imprisonment or release on probation or parole) prior to the instant offense, any convictions prior to that period are not counted. Others leave this item as a departure consideration. *See generally* Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples & Oranges*, 25 U.C. DAVIS L. REV. 679 (1992); Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645 (1993).

[61] *See* Peter B. Hoffman & James L. Beck, *The Origins of the Federal Criminal History Score*, 9 FED. SENTENCING REP. 192, 193–94 (1997) (discussing the Sentencing Commission's consideration of the SFS and its construction of the criminal history categories).

[62] *See id.* at 193.

[63] *See id.*

b. *Juvenile Convictions*

Similar to an offense's "staleness," most people are particularly forgiving when it comes to juvenile offenses, so-called youthful indiscretions.[64] The guidelines currently do consider offenses that occurred before the defendant's eighteenth birthday, except under certain narrow circumstances. Such juvenile offenses, however, cannot receive more than two points unless the defendant was convicted as an adult.[65]

Using juvenile offenses to inform criminal history computations has been controversial. Some argue that juvenile adjudications should not contribute to the criminal history score because juvenile courts typically focus on the juvenile's welfare and treatment, and generally have a more informal process. For example, juvenile courts' standard of proof may be somewhat lower than adult courts, counsel may not always be afforded, and the proceedings may not include all federally guaranteed procedural protections.

More importantly, juvenile records are less reliable than adult records because of different jurisdictional policies on recording and disclosing juvenile offenses. As a practical matter, then, while juvenile records may be available for a defendant in one state, they may not be available for an otherwise similarly situated defendant who had the fortune to be convicted in a state that shields juvenile convictions. This inconsistency can result in substantial disparity in the criminal history score computation.[66] Some juveniles are penalized because the

---

[64] This has been changing as pressure has mounted to treat juvenile offenders who commit serious offenses similarly to their adult counterparts. *See, e.g.*, Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 83–84 (2000); Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 47–51 (1998); Wayne A. Logan, *Proportionality and Punishment: Imposing Life without Parole in Juveniles*, 33 WAKE FOREST L. REV. 681, 681–84 (1998).

[65] Two points can be assessed if the period of incarceration extended into the five-year period prior to the commencement of the instant offense. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.2(d)(2)(A). One point can be assessed if sentence was imposed within the five-year period prior to the commencement of the instant offense. *Id.*

[66] Nonetheless, most states include juvenile adjudications in the computation of criminal history score because many argue that a juvenile record, in particular violent behavior, is a strong predictor of future criminal conduct. *See* David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769 (1991). In fact, some restrict the use of juvenile offenses to include only convictions for violent offenses. Others restrict the use of juvenile offenses if the defendant is an older offender. For example, in Maryland, juvenile convictions are not included in the sentence determination if the defendant is twenty-six years of age or older at the time of commission of the instant offense. The argument is

state may make their criminal records available to federal probation officers, while other juveniles may receive an unexpected benefit in that their juvenile offenses may be sealed and are thus unavailable. As a result, a supposedly first-time *federal* offender may be anything but, and in fact may have a substantial juvenile record that may not be counted (or even available).

c. *Crimes Related to the Present Offense*

Acknowledging that ancillary crimes related to the offense of sentencing do not necessarily have predictive power, the Sentencing Commission chose not to include such offenses for criminal history purposes. What constitutes a "related offense" for purposes of the criminal history computation is fairly complicated. Basically, the guidelines consider prior sentences as related if they "(A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing."[67] That is not quite the end of the story, however. If the previous offenses were separated by intervening arrests, the guidelines do not consider them related, and they therefore become fair game for inclusion in the criminal history score.[68]

One result of this rule is that related cases receive only a single set of criminal history points regardless of the number of offenses for which sentence was imposed. Nevertheless, there is an important exception where one (or more) of the related cases is a crime of violence. Sentencing Guideline section 4A1.1(f) permits a one point increase (up to a total of three points) for each prior crime of violence that did not receive any points because it was considered related to another sentence for a crime of violence. Although this rule is likely one of the most confusing in Chapter Four, as a practical matter, in most cases, only the most serious of the offenses is used to determine the criminal history score. Few, if any, of these defendants will end up in Category I.

---

that as the offender gets older, the use of a juvenile record as predictor of criminality diminishes.

[67] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.2, cmt. n.1.

[68] *See id.*

II. Assessing the Characteristics of Criminal History Category I Offenders & Offenses

A. *Case Studies*

One difficulty with the current design of criminal history categories is their precision in measuring future recidivism and their ability to measure the offender's increased culpability as a result of his previous contact with the criminal justice system. As a simple matter of equity, consider the following actual defendants culled from Sentencing Commission data: each of the four defendants is a male between twenty and thirty years old and was convicted of trafficking in 5000 kilograms of cocaine.[69] None of the defendants received an enhancement for carrying a weapon, but neither did any of the defendants receive any sort of departure—upward or downward. The only discernable difference among these defendants, all of whom fall within Criminal History Category I and have zero criminal history points, is in their *actual* criminal records. Defendant A has no prior criminal convictions of any sort, counted under criminal history or not, nor has he had any prior contact with the criminal justice system. He is, in fact, a *true* first-time offender. Defendant B has a prior, nonviolent minor criminal conviction, but otherwise his record is clean. Defendant C, on the other hand, has a prior violent offense, a previous minor offense, and two juvenile offenses, but none of those offenses is scored for criminal history purposes because each of his prior convictions is either too old, too insignificant, or otherwise fits within the purview of excludable prior offenses. Finally, Defendant D has a single prior drug trafficking conviction—similar to the present offense of conviction—but that offense's age excludes it from consideration.

The issue is, all other things being equal, whether these offenders ought to be treated similarly, whether the existence—or lack—of prior convictions warrants special consideration, or even whether the nature of the prior offenses merits differentiation in terms of punishment. After all, in other circumstances, the criminal history categories distinguish among offenses. Keeping these considerations in mind, however, I would first like to turn to developing a working definition of first-time and low-level offenders.

---

[69] *See* U.S. Sentencing Commission, 1999 Sourcebook of Federal Sentencing Statistics (2000).

B. *Devilish Definitions*

As that venerable saying goes, the devil is in the details. Arriving at an appropriate definition for a "low-level, first-time offender" is fraught with difficulty. To a casual observer, a *true* first-time offender might be someone who had never previously been convicted of a crime. I think that would likely be the definition the standard person-on-the-street might provide. To the extent such a definition is applied, it is likely that many otherwise seemingly law abiding folks might drop out of the definition. The original Sentencing Commission, in establishing criteria for the criminal history categories, instead adopted a series of compromises for incorporating criminal history into the guidelines. While it might be easy to define a first-time offender solely in the context of being in Criminal History Category I, such a measure is not terribly reliable. As this article will show, the term "first-time" offender may mean several things: First, a non-citizen may have no prior criminal record in the United States, but that does not mean that she is a true first-time offender. A non-citizen may have prior foreign convictions, which are not counted for criminal history purposes.[70] Good reasons—both practical and theoretical—doubtless exist for excluding foreign-based convictions, but it is incongruous to suggest that an offender who has a previous serious offense is a true first-time offender.

Second, certain juvenile offenses may not be available, in no small part due to the inadequacy of juvenile justice system record keeping, or may have been statutorily expunged. American criminal justice systems have long treated juvenile offenders differently from adult offenders, but the existence of juvenile offenses (provided they are sufficiently serious) would remove an individual from first-time offender status. Finally, the sentencing guidelines themselves exclude a "sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense."[71] Under such circumstances, the offender is granted an indulgence for an old offense. Often, these offenses wind up being juvenile infractions. Regardless, the mere fact that such an offense exists ought to remove the offender from the category of true first-time offenders.

---

[70] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.2(h). Foreign sentences, however, may be taken into account under § 4A1.3, Adequacy of Criminal History Category.

[71] *Id.* § 4A1.1, cmt. n.1.

For the purposes of this article, "first-time" offenders will be limited to those who have no prior criminal offenses (at least, no prior recorded criminal offenses). Distinctions will be drawn between those who have no prior recorded offenses and those who have no assignable criminal history category points. A first-time offender should have *no* prior criminal convictions—whether excluded or not. Low-level offenders will simply denote those non first-time offenders who nevertheless fall within Criminal History Category I.[72]

No doubt, critics will note that few differences exist between "true" first-time offenders, and those who may have but a single conviction or even several minor convictions. It may be argued that a single prior conviction (or even a string of minor violations) has neither predictive power nor does it demonstrate that the offender has any greater culpability. While this complaint has merit, it must be noted that as Rome was not built in a day, neither can reform for first-time offenders, however defined, take place over night. Morally, legally, and *politically* there is a difference (however small) between a true first-time offender and one who has a prior record. What is ultimately important—or at least what Congress appeared to think was important—is whether the prior offenses either demonstrate the likelihood of recidivism, illustrate the defendant's dangerousness to the community, or suggest a greater degree of culpability.

That just results cannot be reached for a majority of offenders, however, does not imply that something should not be done for those offenders who may have a certain degree of political popularity as well. A second—more serious, in my view—criticism may be leveled at this definition: non-citizen offenders may have foreign convictions that remain untallied and certain juvenile offenses may not be discoverable. The answer to this argument must lie in practicality. While it is true that certain offenders who appear to have entirely clean records may in fact have prior convictions, those individuals should not be permitted to drive the system. Moreover, the practicality of uncovering foreign convictions (and some juvenile convictions, to a lesser degree) will always plague the system in some respect. Once again, how-

[72] The Department of Justice, in its 1994 report *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 4, 1994), used two different sets of criteria for defining low-level drug offenders. The Department created two classes of offenders, those who had "no current or prior violence in their records, no involvement in sophisticated criminal activity, and no prior commitment." *Id.* at 2. The second offender class was restricted to "those offenders with zero criminal history category points." *Id.* For purposes of this article, I have chosen to use a slight variation on these criteria.

ever, this practical reality ought not outweigh the possibility of comporting the congressional directive to treat first-time offenders (however defined) differently from other offenders.

I therefore think it safe to include within any reasonable definition of "first-time offender" those who fall within Criminal History Category I and have zero criminal history points, and no other known convictions. As a reference of comparison, given the fairly minor offenses that can add a single point to an offender's score, the ensuing discussion will keep track of those individuals within Criminal History Category I who have but a single point as well.

C. *The Characteristics of Criminal History Category I Offenders in the Federal System*

1. Description of the Research Methodology

In order to prepare this analysis, data was used from the Sentencing Commission's Intensive Study Sample ("ISS") as well as the *1999 Sourcebook of Federal Sentencing Statistics*.[73] The ISS data comprises a five percent random sample of all fiscal year 1995 federal convictions in which the United States Sentencing Guidelines were applicable.[74] The sample resulted in the intensive study of 1918 individual federal cases. For these 1918 sampled cases, standard data files collected by the Commission were supplemented by coding additional detailed information on prior criminal convictions, offender personal characteristics, elements of the offense conduct, and aspects of drug involvement as indicated in the individual defendant's presentence reports. Probation officers create presentence reports for use at the sentencing hearing; these reports represent the most comprehensive, and (presumably) accurate, information about defendants prior criminal behavior that is currently available to researchers.[75]

---

[73] This includes the latest sentencing data available to researchers. *See* U.S. SENTENCING COMMISSION, *supra* note 69.

[74] For a discussion of trends in federal criminal history data that illustrate the similarity in criminal history data since the ISS data were collected in fiscal year 1995, see Linda Drazga Maxfield, Trends in the Prior Conviction Confinement Lengths for Offenders Sentenced Under the Federal Sentencing Guidelines (Mar. 2000) (Office of Policy Analysis Research Working Paper, U.S. Sentencing Commission) (on file with author).

[75] The information recorded for each offender's criminal history included for each prior conviction: the date and location of any prior conviction(s); the type of offense; the presence of threatened (or actual) violence; the presence and extent of victim injury; the presence, type and use of any weapon; the imposed sentence length; and all points as-

As with any study of this sort, inescapable caveats are important to keep in mind. Among the important methodological limitations that must be noted, for example, the methodology used herein pools all prior convictions receiving criminal history points across the offenders included in the ISS. As a consequence, the set of prior convictions studied are not a *true* random sample of *all* prior convictions of federal offenders. It is not unlikely that correlations exist between offense characteristics of one offender's multiple same-offense convictions or that propensities for dangerousness are person-based rather than offense-based. Absent the tracking and cross-correlation of specific offenders and offenses, it is difficult to separate out such bias. Despite the fact, however, that the statistics recounted here may be biased in an unknown direction and to an unknown degree, given the sample's randomness, it will be assumed for purposes of this article that any potential bias is negligible.

A second limitation with the data must similarly be noted, and cannot be sufficiently emphasized. In 1995, roughly 24.8% of offenders falling within Criminal History Category I were non-citizens; similarly, in 1999, 24.8% were non-citizens.[76] As a result, it is difficult—if not impossible in some cases—to assess with precision their prior criminal behavior. Thus, even many of those who receive no more than a single criminal history point, may in fact have a significant criminal past. The difficulty of obtaining criminal records from foreign governments, places certain limitations on conclusions that can be drawn from the sample. Moreover, it is not altogether unlikely that the identities of illegal aliens who commit repeat offenses (to the extent any fall into that category) may change from one offense to another and thus will prove difficult to track. That having been said, it is still possible to get some sort of an idea of the characteristics of first-time offenders in the federal system.

---

signed in the Chapter Four criminal history computation. U.S.S.G. § 6A1.1; FED. R. CRIM. P. 32 (b).

[76] In 1995, 15,475 offenders had zero criminal history points; of those individuals, 73% were citizens, and 27% were non-citizens. There were 3310 offenders who had one criminal history point; 85% were citizens and 15% were non-citizens. As an important point of comparison, in 1999, 20,707 offenders had no criminal history points. Roughly 64% were citizens, and 36% were non-citizens. There were 4429 offenders who had one criminal history point; 80% were citizens and 20% were non-citizens. The overall proportion of non-citizen offenders increased from about 25% in 1995 to about 33% in 1999, reflecting, among other things, possible increases in illegal immigration, prosecutorial decisions and law enforcement efforts. Data on file with the United States Sentencing Commission.

2. Summary of the Age, Race and Gender of Category I Offenders

As might be expected, Criminal History Category I is dominated by young males.[77] Fully 43.6% of all 1999 Category I offenders are thirty years old or younger, and 78.3% are male. Hispanics, followed by whites, are most frequently represented in Criminal History Category I. The following table illustrates the age, race, and gender of offenders who fall within that category.

Table 1

Age, Race, and Gender of Offenders in Criminal History Category I[78]

	All Criminal History Category I		0 Criminal History Points		1 Criminal History Point	
	n	%	n	%	n	%
TOTAL[79]	**27,026**	**100.0**	**20,689**	**76.6**	**6,337**	**23.4**
Age	26,787	100.0	20,463	100.0	6,324	100.0
Under 21	1,793	6.7	1,396	6.8	397	6.3
21 to 25	4,995	18.7	3,675	18.0	1,320	20.9
26 to 30	4,866	18.2	3,564	17.4	1,302	20.6
31 to 35	3,998	14.9	3,006	14.7	992	15.6
36 to 40	3,441	12.8	2,606	12.7	835	13.2
41 to 50	4,721	17.6	3,731	18.2	990	15.7
Over 50	2,973	11.1	2,485	12.2	488	7.7
Race	26,932	100.0	20,610	100.0	6,322	100.0
White	9,430	35.0	7,211	35.0	2,219	35.1
Black	5,597	20.8	3,755	18.2	1,842	29.2
Hispanic[80]	10,492	39.0	8,505	41.3	1,987	31.4
Other	1,413	5.2	1,139	5.5	274	4.3
Gender	27,025	100.0	20,688	100.0	6,337	100.0
Male	21,151	78.3	15,876	76.7	5,275	83.2
Female	5,874	21.7	4,812	23.3	1,062	16.8

[77] Of the 27,026 cases in Criminal History Category I, 325 cases were excluded from the separate analyses due to missing values on one or more of the included variables: missing age (239), missing gender (1), or missing race (94). Descriptions of variables used in this table are provided in U.S. SENTENCING COMMISSION, 1999 DATAFILE, Appendix A., USSCFY99 (on file with author) (hereinafter 1999 DATAFILE).

[78] Fiscal Year 1999. SOURCE: 1999 DATAFILE, *supra* note 77..

[79] Of the 27,026 cases in Criminal History Category I, 325 cases were excluded from the separate analyses due to missing values on one or more of the included variables: missing age (239), missing gender (1), or missing race (94). Descriptions of variables used in this table are provided in Appendix A.

[80] For the purposes of this analysis, defendants whose ethnic background is designated as Hispanic are represented as Hispanic regardless of racial background.

3. The Characteristics of Category I Offenders

Employing the working definitions of first-time and low-level offenders,[81] we can focus solely on those offenders who fall within Criminal History Category I. In fiscal year 1999, the latest year for which data is available,[82] 25,346 offenders fell within that criminal history category.[83] That number represents some 52.7% of all federal offenders sentenced under the guidelines.[84] In other words, slightly over half of all federal offenders fall within Criminal History Category I and thereby have garnered no more than a single criminal history point. That is not an insignificant number, and obviously represents a substantial commitment of federal resources to prosecuting a particular type of criminal defendant, namely those who may have no substantial (reported) criminal past. Any refinement of Criminal History Category I alone could thus affect over half of all federal offenders. Lest we become too detached by referring to mere numbers, however, let us recall that this represents 25,346 men and women (a number equivalent to a good-sized state university) who are serving time in federal prison. They are not leading otherwise productive lives and have previously been convicted of no more than a single (that is, recordable and not ignored for other reasons) criminal offense.[85]

4. The Characteristics of Present Convictions

If a principal feature of criminal history is to determine who is most deserving of increased punishment either (1) because they "know" about the system and thus were in some way forewarned and more culpable, or (2) present a danger because of their prior criminal record, then the relative "dangerousness" of their previous offense or offenses ought to be taken into account, as well as whether they have repeated particular types of offenses.

---

[81] *See* discussion *supra* Part IB.

[82] This is the latest available data at this writing. *See* U.S. SENTENCING COMMISSION, *supra* note 69.

[83] *Id.* at 46.

[84] A group of 55,557 individuals. *Id.* This total includes only those defendants convicted in federal court who are subject to the sentencing guidelines, which necessarily excludes, for example, military offenders.

[85] The only good rationale for grouping one-pointers with those who have no prior convictions is if the prior offenses have either no predictive power or do not tend to increase acknowledged criminal culpability.

With this in mind, the following table identifies the offense types[86] for those cases in 1999 where the offender was in Criminal History Category I:

Table 2

Offense Type for Those Cases in FY99 Where the Offender Was in Criminal History Category I.

Offense Type	Frequency[87]	Percent	Frequency	Percent
Murder	57	0.2	57	0.2
Manslaughter	39	0.1	96	0.3
Kidnapping	39	0.1	135	0.5
Sex Abuse	158	0.5	293	1.0
Assault	199	0.7	492	1.7
Robbery	539	1.9	1031	3.6
Arson	41	0.1	1072	3.7
Drug Trafficking	12309	42.7	13381	46.4
Drug Comm Fac	196	0.7	13577	47.0
Drug Simp Poss	349	1.2	13926	48.3
Firearms	657	2.3	14583	50.5
Burglary/B/E	24	0.1	14607	50.6
Auto Theft	80	0.3	14687	50.9
Larceny	1407	4.9	16094	55.8
Fraud	4261	14.8	20355	70.5
Embezzlement	873	3.0	21228	73.6
Forg/Counterf	630	2.2	21858	75.7
Bribery	173	0.6	22031	76.3
Tax Offenses	640	2.2	22671	78.6
Launder	782	2.7	23453	81.3
Extortn/Racket	509	1.8	23962	83.0
Gamb/Lottery	105	0.4	24067	83.4
Civil Rights	63	0.2	24130	83.6
Immigration	2760	9.6	26890	93.2
Porn/Prost	337	1.2	27227	94.3
Prison Offenses	28	0.1	27255	94.4
Admin Justice	555	1.9	27810	96.4
Env/Fish & Wild	157	0.5	27967	96.9
National defense	17	0.1	27984	97.0
Antitrust	42	0.1	28026	97.1
Food & Drug	59	0.2	28085	97.3
Other	773	2.7	28858	100.0

As the table recounts, by far the most common offense of conviction for Category I offenders is drug trafficking (42.7%). Contrary perhaps to popularly held belief, simple drug possession represents only 1.2% of all the Criminal History Category I convictions. The second most common offense type represented in Criminal History

[86] For the purposes of this table, "offense type" is classified by the statute of conviction that had the highest statutory maximum prison sentence.

[87] Frequency Missing = 47.

Category I is fraud (14.8%), followed by immigration offenses (broadly defined) (9.6%).

Curiously, the number of violent crimes represented in Criminal History Category I include: 57 murders, 539 robberies, 199 assaults, and 158 sexual abuse cases. The following table reports the length of imprisonment for Criminal History Category I offenders:

Table 3

Length of Imprisonment[88] for Criminal History Category I Offenders Sentenced in FY99

	All CHC Offenders			CHC I with Zero Points			CHC I with One Point		
Offense Type of Instant Offense	n	Median months	Mean months	n	Median months	Mean months	n	Median months	Mean months
Murder	6e+89	114.0	136.4	5e+87	114.0	142.4	9e+65	114.0	102.4
Manslaughter		16.0	21.1		16.0	23.5		13.0	11.3
Kidnapping		68.0	112.1		61.5	110.7		118.0	119.0
Sex Abuse		34.5	62.4		36.0	65.9		24.0	48.7
Assault		23.5	30.8		23.0	32.0		24.0	26.8
Robbery		51.0	79.2		51.0	76.8		57.0	85.5
Arson		60.0	58.3		54.0	50.1		60.0	77.8
Drug Trafficking		37.0	53.1		36.0	50.5		46.0	64.2
Drug Comm Facility		46.0	43.3		46.0	43.2		47.0	43.7
Drug Simple Possession		6.0	12.3		6.0	8.3		6.0	24.9
Firearms		19.5	35.0		18.0	36.9		21.5	30.6
Burglary/B/E		15.0	14.7		15.0	16.4		14.0	12.1
Auto Theft		12.0	41.6		12.0	48.6		5.0	6.7
Larceny		10.0	13.7		11.0	14.1		10.0	11.6
Fraud		12.0	15.9		12.0	16.4		10.0	13.0
Embezzlement		4.0	8.7		4.0	8.7		4.0	8.8
Forgery/Counterfeiting		11.0	10.9		12.0	11.2		9.0	10.0
Bribery		12.0	16.2		12.0	16.9		6.0	10.3
Tax Offenses		12.0	17.2		12.0	15.3		11.0	33.2
Money Laundering		30.0	37.8		30.0	37.8		31.0	37.6
Extortion/Racket		46.0	72.5		46.0	73.4		41.5	68.0
Gambling/Lottery		6.0	9.5		6.0	8.9		12.0	12.0
Civil Rights		27.0	44.0		25.5	48.4		27.0	26.4
Immigration		7.0	11.1		7.0	10.9		6.5	12.4
Porn/Prostitution		27.0	42.4		27.0	41.6		30.0	46.8
Prison Offenses		9.0	15.8		6.0	16.2		12.0	12.0
Admin Justice		12.0	21.1		12.0	21.0		12.0	22.1
Environ./Fish/Wildlife		6.0	10.9		7.0	11.7		4.5	7.7

[88] Sentence length statistics include time sentenced to prison. Cases with zero months in prison ordered are excluded. The information presented in this table does not include any time of confinement as defined in the U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 5C1.1. This table excludes cases where offender data are missing for any or all of the following variables: instant offense type, criminal history category, the sum of all criminal history points received by the offender, or sentence length. 1999 DATAFILE, *supra* note 77.

Table 3
Length of Imprisonment[88] for Criminal History Category I Offenders Sentenced in FY99

National Defense	27.0	78.6	30.0	84.3	5.0	5.0
Antitrust	3.5	8.4	3.5	8.4	.	.
Food and Drug	4.0	7.6	4.0	7.8	8.0	6.7
Other	11.5	20.6	12.0	21.1	6.0	18.2

Of course, the present offense of conviction has no bearing upon the criminal history category. As a result, we shall turn to the characteristics of the prior offenses which in fact determine the criminal history categories.

5. Characteristics of Prior Offenses

The following section will examine the nature of offenses both included and, more importantly, *excluded* from the criminal history computation.

a. *Offenses Included in the Criminal History Computation*

For all federal offenders, 1995 ISS data indicate that only an estimated 47.6% of prior convictions find their way into the criminal history computation. For federal offenders who have previous convictions, on average between thirty to forty percent of those prior convictions are excluded from the criminal history computation because they fail one of the criteria for inclusion. As a consequence, an offender with four convictions included in his criminal history score will have on average 3.1 of those earlier convictions excluded from the criminal history computation. Of importance for this article, even for an offender with *no included* prior convictions of record, that offender nevertheless on average had *2.3 actual convictions* that were excluded from the criminal history category score. Thus, even the average "zero pointer" in Criminal History Category I had roughly two prior convictions not counted for criminal history purposes. As previously explained, this demonstrates the fallacy of defining offenders with zero criminal history points as true "first-time offenders." In fact, these offenders may have prior convictions, but those convictions are excluded pursuant to the criminal history scoring rules.[89]

[89] It is important to note that the majority of prior excluded offenses, regardless of their offense category, received sentences of less than 60 days. This, of course, suggests that most of these offenses are fairly minor.

Table 4
Average Number of Prior Convictions Excluded from Criminal History Computation[90]

# of Convictions Included in Computation	Average # of Convictions Excluded
0	2.3
1	1.1
2	1.8
3	2.1
4	3.1
5	3.3
6	4
7	3.8
8	3.2
9	4.8
10 or more	5.5

More importantly, however, of those offenders within Category I, some 20,929 persons, or 43.7% of all federal offenders, have no assignable criminal history points.[91] And roughly 4,450 offenders, or 9.3% of the total number of offenders, have only one criminal history point.[92]

To further refine this analysis, among offenders with no *reportable* criminal history points, we find that (according to ISS data) 71% (taken from a random sampling of 726 zero criminal history point cases) have no recorded prior offenses at all. In other words, these individuals do not have any convictions of record on file in any criminal justice system (state or federal) that are publicly reported (and/or available). That does not mean, as has been emphasized elsewhere, that their records are entirely "clean." These defendants may have juvenile offenses, foreign convictions, or other expunged priors. What it does mean, however, is that insofar as it is ascertainable, these defendants have no convictions of record that are known to federal judicial officials.

[90] For offenders with prior convictions, on average 30% to 40% of the convictions do not meet conditions for inclusion in the criminal history computation. Note that the chart includes all offenders with any prior convictions. U.S. SENTENCING COMMISSION, FIVE PERCENT INTENSIVE STUDY SAMPLE OF OFFENDER DATAFILE OPAFY95 (on file with author) (hereinafter FIVE PERCENT SAMPLE).

[91] U.S. SENTENCING COMMISSION, *supra* note 69, at 45. Among these offenders, 64% were U.S. citizens, and approximately 36% were aliens.

[92] By comparison, in 1995, the year for which the ISS was done, there were 50,754 cases for which the Sentencing Commission was able to compile sentencing data. Of those, roughly 57% comprised Category I offenders. Roughly 80% of these offenders were U.S. citizens, and 20% were non-citizens.

Table 5
Reasons for Exclusion of Prior Convictions in Zero Criminal History Point Cases
Fiscal Year 1995[93]

Reason	%
Convictions w/o Counsel/Waiver	0.2
Overturned Conviction	0.4
Diversionary Sentence	1.3
Foreign Offense	3.2
Juvenile/Status Conviction	9.5
Expunged	0.4
Military Offense	0.2
Minor Offense	43.3
Part of Instant Offense	1.7
Related Case	2.3
Tribal Offense	3.8
Conviction Too Old	29.4
Other	4.2

The remaining 29% of defendants with recorded offenses, however, have convictions that were statutorily excluded from the criminal history computation and thus were not assigned a criminal history point. These are "zero pointers" who nevertheless have a prior conviction of record. In concert with the guidelines' understanding of the purposes for considering past offenses in sentencing a defendant for a present offense, it is important to understand the nature of those prior offenses. As the table shows, the most commonly excluded offense was vehicular (although not one involving drunken driving). Indeed, slightly over a quarter (25.3%) of these excluded prior convictions involved a vehicular offense of some type. Other minor offenses comprised the second-most significant category (17.7%), closely followed by theft (16.7%). Among the more serious offenses identified as being excluded, drug trafficking accounted for 3.2% of excluded prior convictions; burglary 2.1%; and, murder 0.6% of excluded convictions.

Table 6
Types of Excluded Prior Convictions in Zero Criminal History Point Cases
Fiscal Year 1995[94]

Offense Type	%
Burglary	2.1
Weapons	3.0
White Collar	5.1

[93] Representing 474 Offenses in 210 Cases (29.0% of 726 Zero Criminal History Point Cases). FIVE PERCENT SAMPLE, *supra* note 90.

[94] *Id.*

Table 6

Types of Excluded Prior Convictions in Zero Criminal History Point Cases
Fiscal Year 1995[94]

Immigration	1.3
Drug Possession	4.6
DUI/DWI	6.8
Vehicular	25.3
Disorderly Conduct	4.0
Murder	0.6
Assault	5.3
Robbery	2.1
Drug Trafficking	3.2
Theft	16.7
Other Minor Offense	17.7
Other Serious Offense	2.3

A similar story is told by the data collected for offenders with a single criminal history point. Approximately 44.5% of the 247 sampled one criminal history point cases had one or more excluded prior offenses.

Table 7

Reasons for Exclusion of Prior Convictions in One Criminal History Point Cases[95]
Fiscal Year 1995

Reason	%
Diversionary Sentence	0.4
Foreign Offense	0.8
Juvenile/Status Conviction	4.9
Military Offense	2.0
Minor Offense	54.2
Part of Instant Offense	3.7
Related Case	4.5
Conviction too Old	24.6
Overturned Conviction	0.4
Convictions w/o Counsel/Waiver	0.4
Other	4.1

Non-alcohol related vehicular offenses are the most commonly excluded prior offenses for those registering one criminal history point, followed by the "other minor offense" category (20.1%) and theft (10.2%). With regard to the more serious excluded offenses, burglary accounted for 1.2% of those convictions; drug trafficking 4.1% of offenses; other serious offenses 2.5%; and, murder 0.8%.

[95] 244 Offenses in 110 Cases (44.5% of 247 One Criminal History Point Cases). FIVE PERCENT SAMPLE, *supra* note 90.

Table 8
Types of Excluded Prior Convictions in One Criminal History Point Cases Fiscal Year 1995[96]

Offense Type	%
White Collar	2.9
Immigration	0.8
Drug Possession	4.5
DUI/DWI	0.7
Vehicular	29.9
Disorderly Conduct	7.0
Murder	0.8
Sexual Assault	0.4
Assault	5.3
Robbery	1.2
Drug Trafficking	4.1
Theft	10.2
Burglary	1.2
Weapons	3.3
Other Serious Offense	2.5
Other Minor Offense	20.1

It is not surprising that vehicular offenses or other non-felony minor offenses would be excluded; what is more troubling perhaps is that nearly ten percent of these excluded offenses are fairly serious in nature.

b. *The Nature of the Prior Convictions*

If one accepts the original Sentencing Commission's reasoning for using certain prior convictions to fashion a sentence for a present offense, then one must look to whether those prior convictions tend to predict a defendant's dangerousness, likelihood of recidivism, or whether—on account of prior contact with the criminal justice system—the defendant is somehow more "culpable."[97] Thus, a ready means of assessing these prior convictions is to determine their relative "dangerousness" or to determine whether they are able to predict recidivist conduct.

[96] FIVE PERCENT SAMPLE, *supra* note 90.
[97] *See* discussion *supra* Part IB.

i. Differentiating Dangerousness on the Nature of the Offense

(a) *Sentencing Length as a Proxy for Dangerousness*

As previously explained, the original Sentencing Commission elected to adopt its current criminal history methodology after balancing a variety of considerations. Assessing the relative seriousness of a prior offense proved to be a challenge. The Commission rejected the idea of using an offense-based system (employed in many states) for assessing a prior record on the grounds that it might incorporate the inevitable prosecutorial disparity that results from varying charging and plea practices.[98] Instead, the Commission found that basing the criminal history score on the prior sentence length reflects a judicial assessment of the seriousness of the underlying criminal conduct.[99] Despite the potential incorporation of prior judicial or legislative disparity, the Commission reasoned that such disparity was likely to be considerably less than that resulting from prosecutorial decisions.

Moreover, the Sentencing Commission was confronted with a number of practical considerations. First, the Commission observed great variety among the states in terms of the definitions of the substantive offenses; thus, employing a methodology similar to the offense-based criminal history systems used by the states was considered more difficult to implement in a national system. By basing the criminal history score on prior sentence length, the Commission hoped to minimize the likely problems that would arise with cross-jurisdictional differences. In other words, defendants in the federal system have priors that result from federal prosecutions and from prosecutions in the fifty state jurisdictions (not to mention the District of Columbia, United States territories, and military adjudications).

Second, it was noted that the state and federal criminal history systems define misdemeanors and felonies differently. In the federal system, the distinction is fairly straightforward: offenses that authorize sentences of imprisonment up to one year are misdemeanors, while those one year and above are felonies.[100] In contrast, some states categorize offenses that authorize sentences of imprisonment up to two

---

[98] *See generally* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.2(a) (defining the term "prior sentence").

[99] *See* Breyer, *supra* note 47, at 19 n.97.

[100] *See* 18 U.S.C. § 3559(a) (defining sentencing classification of offenses).

years as misdemeanors.[101] Therefore, a system that utilized only misdemeanor and felony distinctions to assess criminal history score would be inequitable and would present practical problems. A more judicious measure of assessing criminal history, examining the underlying conduct of the prior offense, while theoretically more palatable, raised serious practical, as well as legal, concerns. As a practical matter, the probation officer would need to obtain police reports (frequently unavailable if offenses occurred more than five years ago) which detail the real offense conduct and then spend substantial resources comparing the offenses. With respect to legal concerns, constitutional issues may arise with assessing criminal history points based on the real offense behavior of the prior offense, particularly where the plea was to a less serious offense.[102]

Despite the legitimate concerns about an offense-based system, the Sentencing Commission nevertheless chose to use at least some elements of this type of system in constructing Chapter Four. As a result, the Career Offender and Armed Career Criminal guidelines both utilize the nature of offense of conviction to determine the applicability of predicate offenses.[103] The current federal system is thus something of a hybrid in that it uses both sentence length and offense type to ascertain a criminal history score.

Ultimately, the Sentencing Commission decided to limit the use of the offense-type in calculating criminal history scores because it determined that assigning criminal history points based on the prior sentence length provided a more realistic method because of its field scoring reliability. If probation officers could not score actual cases accurately and consistently, the Commission explained, both the predictive power and equity of the criminal history score would suffer. The Commission considered that field scoring reliability of an offense-based system would be affected by the complexity and difficulty

---

[101] *See, e.g.*, IOWA CODE ANN. § 903.1(2) (West 2000) (establishing a two year maximum sentence for aggravated misdemeanors); MD. CODE ANN., Art. 2B ALCOHOLIC BEVERAGES § 20–102 (2000) (establishing two year maximum for certain alcohol establishment violations); MICH. STAT. ANN. § 14.15(16177)(2)(b) (Michie 2000) (establishing a two year maximum; N.J. STAT. ANN. §§ 2C:43–1, 2C:43–6 (West 2000) (designating and defining a "high misdemeanor" as a crime carrying a statutory penalty between one and five years) sentence for certain licensing violations).

[102] This is particularly true in the wake of the recent United States Supreme Court decision, *Apprendi v. New Jersey*. *See* 120 S. Ct. 2348, 2360–63 (2000) (finding that any fact, except criminal history, that increases punishment beyond the statutory maximum must be proved to a jury beyond a reasonable doubt).

[103] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36,§ 4B1.1, § 4B1.2 & cmt. n.1, § 4B1.4 & cmt. n.1.

in obtaining verified information. This practical consideration was critical in the adoption of the final version criminal history categories and is likely the principal reason why the Commission's method of assessing criminal history points varies so greatly from state guideline systems.[104]

(b) *The "Dangerousness" of Prior Offenses*

Prior Sentencing Commission work has attempted to establish a practical framework for analyzing the comparative "dangerousness" of prior offenses.[105] Understanding the nature of the prior offenses committed by Category I offenders is essential for understanding whether criminal history category groupings achieve the purposes outlined by the original Commission. Essentially, three elements have been identified as serving as a proxy to measure an offense's dangerousness: an injury resulting from the offense; the role of violence in the offense; or, the presence of a weapon during the offense's commission.[106] Inclusion of violence and injury in the criteria is well-defined. Similarly, the presence of a weapon is generally regarded as enhancing the likelihood of injury and violence, and, hence, the offense's seriousness.

As might be expected, assault, robbery, and weapons trafficking offenses each have high dangerousness components, roughly: 90%, 92%, and 93%, respectively. The types of danger involved in these three offense types, however, reflect different patterns. Assault convictions involve injury 43.4% of the time. Data from the ISS indicate that the level of these injuries is high: 46.2% of assault convictions involve serious injuries or death; an additional 27.9% involve minor injuries. Violence without injury, however, occurs in 45.8% of assault convictions.

---

[104] *See* Hoffman & Beck, *supra* note 44, at 194. Ironically, this system also may have contributed to the complexity that now exists in determining criminal history scores.

[105] Linda Maxfield & Susannah Tarpley, Prior Dangerous Criminal Behavior and Sentencing Under the Federal Sentencing Guidelines (May 2000) (Office of Policy Analysis, U.S. Sentencing Commission) (on file with author).

[106] Because, more often than not, these elements appear together in a case, the definition ranks these three elements: injury supersedes violence and violence supersedes weapon involvement. The method permits offenses to be hierarchically classified into a dangerousness scale. If, for example, an offense involves both victim injury *and* weapon use, this offense would appear in the "injury" category for dangerousness.

Table 9
Distribution of Dangerousness Within Included Prior Offense Types Represented in Criminal Histories of Federal Offenders Sentenced in 1995[107]

Offense Type of Prior Conviction	Dangerousness	Weapon	Violence	Injury
Assault	90.2%	1%	45.8%	43.4%
Robbery	92%	10%	67%	15%
Weapons Trafficking	92.6%	76.2%	14.8%	1.6%

Although robbery convictions are less likely to involve injury (15.0%), they often involve violence without injury (67.0%). For robbery cases with injury, 7.1% involve serious injury and an additional 11.5% involve minor injury. Weapons trafficking offenses, on the other hand, have the bulk (76.2%) of their dangerousness component due to presence of a weapon, which by definition is an expected element of the offense behavior. Although violence occurs 14.8% of the time for these offenses, actual injury is uncommon (1.6%).

For all prior offenses (excluded and included) among Criminal History Category I offenders with only a single point, 13.9% of those offenses included some indicia of violence. Specifically, 3.6% of those cases resulted in injury; 6.2% involved violence; and in 4.1% of those cases, a weapon was present. Among those same offenders, 2.9% of the *excluded* cases involved injury; 5.4% involved violence; and in 4.9% of those cases, a weapon was present. In other words, nearly 3% of the excluded cases involved an element of dangerousness.

Table 10
Distribution of Dangerousness Among Prior Offenses: One Point Criminal History I Offenders Sentenced in 1995[108]

	Weapon %	Violence %	Injury %
All Prior Offenses (n = 387)	4.1	6.2	3.6
Included Prior Offenses (n = 183)	3.3	7.1	4.4
Excluded Prior Offenses (n = 204)	4.9	5.4	2.9

[107] The Five Percent Intensive Study Sample includes 1,018 offenders in Criminal History Category I with a combined total of 836 prior convictions. This table excludes cases where offender data are missing for any or all of the following variables: prior offense type and the number of criminal history points assigned to a prior conviction. FIVE PERCENT SAMPLE, *supra* note 90.

[108] The chart includes only offenders in Criminal History Category I with one criminal history point. "All prior offenses" includes all prior convictions, whether or not receiving criminal history points. FIVE PERCENT SAMPLE, *supra* note 90.

For defendants who had no criminal history points (and thus no included prior offenses), their excluded offenses nevertheless had elements of dangerousness. For those offenders, 1.7% of their excluded convictions resulted in injury; 5.5% involved violence; and in 3.3% of the excluded cases, a weapon was present. Thus, in fully 10.5% of the cases excluded from consideration under the criminal history score, some sort of dangerousness was present. Despite that seemingly significant number of prior offenses involving some aspect of violence, these offenders nevertheless have a "clear" score for criminal history purposes.

Table 11

Distribution of Dangerousness Among Prior Offenses: "Zero Point" Criminal History I Offenders Sentenced in 1995[109]

	Weapon %	Violence %	Injury %
All Prior Offenses (n = 417)	3.3	5.5	1.7
Included Prior Offenses (n = 0)	N/A	N/A	N/A
Excluded Prior Offenses (n = 417)	3.3	5.5	1.7

As an indication of how potentially dangerous these excluded cases are, the ISS data indicate that guns are the most likely weapons involved in prior offense behavior. While the presence of any weapon increases the opportunity for injury or violence, firearms make the offense especially serious. Depending upon offense type, the proportion of weapons that are guns ranges from sixty percent and higher. The only exception to that is with respect to assault convictions, where fewer than fifty percent of weapons involved are guns. The presence of dangerousness in these cases suggests that the exclusion criteria perhaps ought to be re-examined.

ii. Prior Similar Offenses in Criminal History Category I

A central concept undergirding the criminal history categories is the control of recidivist behavior among offenders. Recidivist theory under the guidelines has two separate, interrelated grounds. The first is whether there are offenses that, when committed, are reliable pre-

[109] The table includes only offenders in Criminal History Category I with zero criminal history points. "All prior offenses" includes all prior convictions, whether or not receiving criminal history points. FIVE PERCENT SAMPLE, *supra* note 90.

dictors of future criminality. Such questions are complicated, and involve fairly complicated statistical methodologies that have been subjected to considerable criticism.[110] Indeed, while the inclusion of seemingly minor crimes—such as non-felony vehicular offenses—in the calculation of criminal histories has been severely criticized, it is important to note that such offenses may, in fact, be good predictors of future criminality.[111] That is not to say they *are* in fact such reliable predictors, it is merely important to know—before including or excluding a particular offense—whether it serves that function. The difficulty is that without further empirical study, it is difficult to determine which offenses ought to be included on those grounds.

A second use of prior criminality, however, is to determine whether a defendant's behavior ought to be assessed criminal history points because she has committed the same sort of offense before and thus is more culpable for the present offense because she had "notice" that her behavior was illegal. The notion being that if a defendant is once convicted, and punished, for committing a particular offense, a second conviction for the same type of criminal conduct should result in a more substantial penalty. Congress has explained this as follows:

> The guidelines should provide that those with previous criminal histories should be punished more severely than first offenders, because the level of culpability of a person with a prior record is higher, and such a person is on fair no-

---

[110] *See* Stephen D. Gottfredson & Don M. Gottfredson, *Accuracy of Prediction Models, in* 2 CRIMINAL CAREERS AND "CAREER CRIMINALS," 239–40 (Alfred Blumstein et al. eds., 1986); *see also* A.B.A. STANDARDS FOR CRIMINAL JUSTICE, 18–2.2, commentary at 68 (1979); John C. Coffee, Jr., *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1001–07, 1018–27 (1978); Peter B. Hoffman, *Screening for Risk: A Revised Salient Factor Score (SFS 81)*, 11 J. CRIM. JUSTICE, 539, 542–43 (1983).

[111] It has been noted that:

> [O]ne of the best predictors of future criminal conduct is past criminal conduct, and the parole-prediction literature amply supports this fact. From the earliest studies to the latest, indices of prior criminal conduct consistently are found to be among the most powerful predictors .... This generalization tends to hold regardless of the measure of prior criminal conduct used or of specific operational definitions of that conduct.

Gottfredson & Gottfredson, *supra* note 110, at 239–40.

tice that subsequent convictions subject such a person to enhancement of punishment.[112]

In reviewing this facet of recidivism, the following table outlines the instant offense distribution for Criminal History Category I offenders in the 1995 ISS data:

Table 12
Instant Offense Distribution for the CHC I Offenders

Type of Offense	# of Offenders	% of Offenders
Missing -9	3	0.3
Assault	18	1.8
Robbery	23	2.3
Theft	80	7.9
Drug	439	43.1
White Collar	255	25
Weapons	99	9.7
Other Serious	79	7.8
Minor	22	2.2

As might be expected, drug offenses (43.1% of offenders) and white collar crime offenses (25.0% of offenders) dominate the field.

Among all prior convictions of offenders who also had a single criminal history point, 8.4% had a prior minor conviction, 4.2% had a prior theft[113] conviction, and 2.0% had a prior assault conviction. Examining convictions excluded from the criminal history computation, 9.9% had one prior minor conviction[114] (8.9% had more than one such conviction) and 6.4% had a prior theft conviction (1.7% had more than one theft conviction). Similarly, 0.8% had one or more robbery convictions (which has a high incidence of violence) and 2.8% had one or more assaults.

---

[112] H.R. Rep. No. 99-523-44, at 99 (1984) (report accompanying H.R. 6012, one of the sentencing guideline bills considered prior to passage of the Sentencing Reform Act of 1984).

[113] The theft category used in this and the following tables includes offenses such as commercial or dwelling burglary, larceny, grand and auto theft, or retail theft.

[114] The other minor offenses category includes offenses such as disorderly conduct, vehicular offenses, DUI/DWI offenses, simple drug possession, gambling, public intoxication, loitering, and prostitution.

Table 13
Patterns of Repeat Prior Convictions: Excluded Convictions CHC I Federal Offenders Sentenced in 1995[115]

	No Prior Convictions for this Offense Type %	One Prior Conviction for this Offense Type %	Two or More Priors for this Offense Type %
Assault	97.2	1.8	1
Robbery	99.2	0.7	0.1
Theft	91.9	6.4	1.7
Drug Trafficking	98.4	1.5	0.1
White Collar	97.9	1.8	0.3
Weapon Trafficking	98.5	1.2	0.3
Other Serious	98.1	1.6	0.3
Other Minor	81.2	9.9	8.9

To break these numbers down even further, of the 1018 sampled offenders, 439 committed drug offenses, and of those defendants, 18 had a prior drug offense of some sort. Of those 99 weapons offenders, 6 defendants had prior weapons offenses;[116] and of the 18 defendants who committed assaults, 5 had previously committed a similar offense.

While not prevalent in Criminal History Category I , there are offenders who have prior offenses that are similar to their present offense of conviction that have nevertheless been excluded from the criminal history calculation. If defendants who repeat certain criminal actions are deemed more culpable than those who have not previously offended, then consideration ought to be given to including otherwise excludable convictions that are similar to the present offense of conviction.

III. Safety Valve Adjustments for Low-Level Offenders

A discussion of first-time offenders cannot be complete without reference to the so-called sentencing safety valve. Contrary to popular belief, there are actually two safety valves—one statutory and one contained within the guidelines. This innovation—generated in part by

[115] The Five Percent Intensive Study Sample includes 1,018 offenders in Criminal History Category I. Percentages indicate the proportion of offenders with a given number of prior excluded convictions for the listed offense categories. For example, 97.2% of Criminal History Category I offenders had no prior assault convictions, while 1.8% had only one prior excluded assault conviction, and 1.0% had two or more prior excluded assault convictions. Chart includes only those prior convictions that did not receive criminal history points. Five Percent Sample, *supra* note 90.

[116] The weapons trafficking category includes offenses such as unlawful trafficking, sale or distribution of weapons, unlawful possession or carrying of a weapon, or unlawfully carrying a concealed weapon.

Congress and in part by the Sentencing Commission—grew in some measure from a belief that first-time, low-level drug offenders merited a reduction in the relatively lengthy federal sentences for drug crimes.[117] In particular, the idea was that these low-level offenders should be able to escape out from under the congressionally imposed mandatory minimum sentences.

A. *The Legislative Safety Valve*

As a result—in part—of a congressional inquiry, in 1993–94, the Department of Justice undertook an analysis of allegedly non-violent drug offenders with minimal criminal histories.[118] At that time, there were slightly over 90,000 inmates incarcerated in federal prison.[119] Separating out drug offenders, the Department of Justice concluded that there were 16,316 federal inmates (36.1% of all drug offenders and 21.2% of the total sentenced federal prison population) who could be classified as "low-level" drug law violators. The Department defined a low-level offender as one who had "no current or prior violence in their records, no involvement in sophisticated criminal activity, and no prior [prison] commitment."[120] Adjusting the data to reflect only those offenders who had zero criminal history points, the Department still found 12,727 inmates who met this classification. Among these violators, even though 42.3% played only "peripheral roles" in drug trafficking, two-thirds of the low-level offenders nevertheless came under then-existing mandatory minimum statutes.[121]

The study seemed to support the general belief that a substantial number of low-level drug offenders were incarcerated in federal prisons. Although the Department of Justice made no specific recom-

---

[117] That is, federal sentences are "relatively lengthy" in comparison with state sentences imposed for similar narcotics offenses. *See, e.g.*, Michael A. Simmons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 916–17 (2000); Alistair Neubern, Comment, *Good Cop, Bad Cop, Federal Prosecution of State Legalized Medical Marijuana Use After* United States v. Lopez, 88 CALIF. L. REV. 1575, 1584 (2000). For a discussion of the safety valve and its interaction with mandatory minimum sentences and the guidelines generally, see Phillip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CINN. L. REV. 1851 (1995), and Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal "Statutory Safety Valve" to Act as an Effective Mechanism for Clemency in Appropriate Cases*, 21 HAMLINE L. REV. 109 (1997).

[118] U.S. DEPT. OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES, executive summary p.1 (1994).

[119] *Id.*

[120] *Id.*

[121] *Id.*

mendation as to what, if any, policies should have been implemented on the basis of its study, Congress took up the cudgel and enacted, as part of the 1994 Crime Bill, a sentencing "safety valve."[122] That legislation enabled certain low-level drug offenders to escape out from under mandatory minimum drug sentences, provided the offenders met the following rigorous criteria. The defendant should: (1) have no more than a single criminal history point; (2) not have used violence or credible threats of violence or possess a firearm or any other dangerous weapon in connection with the offense; (3) have neither an aggravated role in the offense, nor have otherwise acted as an organizer or supervisor of others in committing the offense; and (4) have provided, no later than the time of the sentencing hearing, all truthful information in his possession concerning the offense itself, or any offenses that were part of the same scheme of conduct. In addition, the present offense of conviction could not have resulted in the death or serious bodily injury of any person, and must have been a narcotics violation for which a mandatory minimum sentence applied and which could not be any lower than a base offense level of twenty-six. Although it seems strange that the safety valve would be limited to those with a base offense level of twenty-six or greater, Congress seemed to intend that some sort of a minimum period of incarceration was necessary.[123] Had the safety valve been extended to those below a base offense level of twenty-six more defendants would have received probation.[124] The safety valve is a useful tool for looking at low-level offenders because it is limited to those who fall within Criminal History Category I and therefore do not have significant (recorded) criminal pasts.

An important feature of the safety valve is that it permits defendants to obtain relief from the statutory minimum even if they have no relevant information to provide to the government. The defendant must provide all relevant information concerning his present criminal conduct, but if he is a relatively insignificant figure with respect to the underlying criminal scheme, he can still benefit from the

---

[122] *See* Pub. L. No. 103-460, H.R. 3979 (codified at 18 U.S.C. § 3553 (f)(1)-(5) (1994)).

[123] In fact, in P.L. 103-322, section 80001, of the 1994 Violent Crime Control Act, Congress, in adopting the legislative safety valve, expressly directed the Sentencing Commission that: "In the case of a defendant for whom the statutorily required minimum sentence is five years, such guidelines and amendments to the guidelines . . . shall call for a guideline range in which the lowest term of imprisonment is at least twenty-four months." 108 Stat. 1986.

[124] *See id.*

safety valve. Prior to Congress' adoption of the safety valve, many low-level offenders did not have the information necessary to receive a section 5K1.1 departure. This meant that perhaps the defendants best suited to receiving a mitigated sentence were denied that opportunity merely because of their negligible role in the offense. In addition to correcting that sentencing anomaly, even if the court determines that the defendant has qualified for the safety valve, it nonetheless remains free to depart downwards on other grounds as well (i.e., family ties and responsibility).

B. *The Sentencing Guidelines Safety Valve*

In addition to the statutory safety valve, the Sentencing Commission itself created an analogue in the guidelines. There is a hidden problem with using the one point definition, rather than the Criminal History Category I definition for triggering the safety valve. By assigning criminal history points on the basis of sentence length and without necessarily taking into account the nature of the prior criminal conduct, the original Commission acknowledged that it might be overly inclusive in how it scored a prior criminal history. In other words, a defendant's record might not be indicative either of her dangerousness, or her likelihood of recidivism. As a consequence, the Commission provided a "safety valve" of its own in the form of an approved method of departure from criminal history scores:

> There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category . . . and therefore consider a downward departure from the guidelines.[125]

The Sentencing Commission thus sanctioned a downward departure in the situation in which the assigned criminal history category

[125] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36,§ 4A1.3.

overstated the defendant's culpability. As noted, in 11.5% of the downward departure cases in 1999, the judges identified the "adequacy of criminal history" as the reason for the departure, suggesting that the assigned criminal history category overstated the defendant's actual criminal record.[126]

C. *The Legislative Safety Valve in Operation*

The safety valve has had a fairly substantial impact upon the sentences of low-level narcotics offenders. As the following table demonstrates, the median sentence length for those with zero criminal history points fell from sixty months in 1993 (the final full year before the safety valve's application) to only thirty-six months as of 1999. Similarly, those offenders with but a single criminal history point saw their median sentences fall from sixty months in 1993, to forty-six months in 1999.

Table 14

Average Length of Imprisonment for Drug Trafficking Cases With Zero or One Criminal History Point over Time[127]

Fiscal Year	Zero Points			One Point		
	N	Mean	Median	N	Mean	Median
1999	9,121	49.5	36	2,124	62.5	46
1998	8,384	53.7	37	1,948	63.8	46
1997	7,768	56.7	37	1,812	66.4	48
1996	6,694	63.2	46	1,741	69.3	49
1995	5,975	66.9	48	1,510	74.0	57
1994	6,737	71.0	51	1,660	75.4	60
1993	7,815	73.3	60	1,843	73.9	60
1992	7,159	76.8	60	1,737	80.9	60
1991	6,272	77.5	60	1,472	73.7	60

Those are fairly substantial drops, which can be at least partially attributed to the safety valve legislation. To some extent, it is possible this decrease may also reflect a growing number of drug trafficking prosecutions where the offenders engaged in less serious conduct. Congress' decision to increase law enforcement resources over the last decade has enabled federal agents to focus not only on so-called drug kingpins, but also on less culpable supporting staff within the

[126] *See id.*

[127] Only cases sentenced under Drug Trafficking (§ 2D1.1) were included in this table. Cases with zero months prison as well as cases missing information about criminal history points or length of imprisonment were excluded. U.S. SENTENCING COMMISSION, 1991–1999 DATAFILE, USSCFY91–USSCFY99 (on file with author).

trafficking organizations as well.[128] The guidelines, of course, even without the benefit of the safety valve, are designed so that lower-level defendants receive substantially shorter sentences than upper-level defendants. As a consequence, if lower-level offenders are being more frequently apprehended and punished, then to the extent that this less culpable group of offenders grows in number more rapidly than the kingpins, overall average sentences will show a decline. Absent evidence to the contrary, however, in light of the fairly precipitous fall in sentence lengths after the safety valve's adoption, it is not unreasonable to presume that it has had at least some effect in lowering the sentences for qualifying defendants.

In 1999, of the 55,557 federal offenders sentenced under the guidelines, some 21,635 fell under section 2D1.1—the drug trafficking guideline—and thus became eligible to be considered for the safety valve. Pursuant to Sentencing Commission data, 8,096 defendants, representing 37.4% of all drug trafficking offenders, did not receive a mandatory minimum sentence.

Table 15

Drug Trafficking Offenders and Mandatory Minimum Status[129]

Drug Mandatory Minimum Status	N	%
TOTAL	**21,634**	**100.0**
No Drug Mandatory	8,096	37.4
5 Year Drug Mandatory	6,308	29.2
10 Year Drug Mandatory	6,844	31.6
More than 10 Year Drug Mandatory	386	1.8

In all, 13,538 defendants fell within the ambit of mandatory minimum sentencing of either five, ten, or more than ten year mandatory minimums. For those individuals sentenced under the drug trafficking guidelines,[130] 15,195 (75.0%) did not receive the benefit of the safety valve, while 5053 (25.0%) did.

[128] As an example of budget and staff growth, between 1994 and 1998, the Drug Enforcement Administration (DEA) budget increased 45.4%, the DEA criminal investigation staff increased 22.7% during that same time period, and the total national drug investigation budget increased 19.8%. TRAC Analysis. Transactional Records Access Clearinghouse Analysis, *available at* http://www.trac.syr.edu/tracdea/findings/national/deabudget.html.

[129] Of the 55,557 cases, 21,635 were sentenced under Drug Trafficking (§ 2D1.1). Of these, one case was missing drug mandatory minimum information. U.S. Sentencing Commission, 1999 Datafile, USSCFY99.

[130] Some 1387 offenders fell out of this table and were not counted.

Table 16

Safety Valve and Drug Mandatory Minimum Status for Drug Trafficking Offenders[131]

Drug Mandatory Minimum Status	Received Safety Valve		No Safety Valve	
	N	%	N	%
TOTAL	5,053	100.0	15,195	100.0
No Drug Mandatory	638	12.6	7,009	46.1
5 Year Drug Mandatory	2,398	47.5	3,514	23.1
10 Year Drug Mandatory	2,007	39.7	4,316	28.4
More than 10 Year Drug Mandatory	10	0.2	356	2.3

Interestingly, the safety valve, while operating fairly closely to Congress' expressed intent, has created a few wrinkles in its application. In 1999, for example, 638 defendants received the benefit of the safety valve although they did not face a mandatory minimum sentence. This is curious in that the safety valve, of course, was expressly designed to trump mandatory minimums. Not unsurprisingly, as the mandatory minimums increased from ten years to more than ten years, the number of defendants receiving the safety valve dropped precipitously. In contrast, both the absolute number, and the percent, of offenders receiving the safety valve increased as between those facing five year mandatory minimums and those facing ten year mandatory minimums. Of the defendants who had zero criminal history points, 4,072 received the safety valve, and 5,068 did not. Some 930 defendants with one point received the safety valve, while 1,229 did not. And, among defendants with more than a single criminal history point, 45 received the safety valve, while 8,870 did not.

Table 17

Safety Valve Adjustment and Criminal History Points for Drug Trafficking Offenders[132]

Number of Criminal History Points	Received Safety Valve		No Safety Valve	
	N	%	N	%
TOTAL	5,047	100.0	15,167	100.0
Zero Points	4,072	80.7	5,068	33.4
One Point	930	18.4	1,229	8.1
More than One Point	45	0.9	8,870	58.5

[131] Of the 55,557 cases, 21,635 were sentenced under Drug Trafficking (§ 2D1.1). Of these, 1387 cases were excluded for one or both of the following reasons: missing information on safety valve status (1387) or missing drug mandatory minimum information (1). 1999 DATAFILE, *supra* note 77.

[132] Of the 55,557 cases, 21,635 were sentenced under Drug Trafficking (§ 2D1.1). Of these, 1421 cases were excluded due to missing information on safety valve status or missing information on criminal history points. 1999 DATAFILE, *supra* note 77.

Table 17

Safety Valve Adjustment and Criminal History Points for Drug Trafficking Offenders[132]

Number of Criminal History Points	Received Safety Valve		No Safety Valve	
	N	%	N	%
TOTAL	5,047	100.0	15,167	100.0

Of those offenders who did not receive the safety valve, the single most common reason for their not receiving it was due to failing several of the requisite criteria. Indeed, 5,556 defendants, 38.9% of all those sentenced for engaging in drug trafficking, failed two or more of the individual criteria required to qualify for the safety valve.[133] The second most common reason for defendants not to receive the safety valve is that they fall outside Criminal History Category I—fully 29.1% of these defendants, 4,152 individuals, have more than one criminal history point. Following closely behind, 23.4% of defendants, 3,349 individuals, are unable to qualify because their base offense levels are below twenty-six. The remaining defendants failed to qualify because: a weapon was present during the commission of the offense (575 defendants or 4.0%); they played a supervisory role in the offense or had some sort of aggravating factor present that denied them the safety valve (312 defendants or 2.2%); they did not provide adequate information to the government with respect to the offense of conviction (317 defendants or 2.2%);[134] of obstruction (24 defendants or 0.2%); or finally, bodily injury or death to an individual resulted during the course of the offense's commission (1 defendant).

Table 18

Reasons Drug Trafficking Offenders Did Not Receive the Safety Valve Adjustment[135]

Reasons	N	%
TOTAL	14,286	100.0
Criminal History Greater Than Category I	4,152	29.1
Weapon Involved in Offense	575	4.0

[133] Given currently available data, it is impossible to discern the precise reason the defendant does not receive the safety valve. It is not unlikely that the sentencing judge, rather than focusing upon a single failing, instead simply declines to apply the safety valve when it is clear multiple criteria will not be met.

[134] Because this number is difficult to ascertain, I have elected to use acceptance of responsibility as a proxy for this category. While an imperfect measure, it most closely approximates this criterion.

[135] Of the 55,557 cases, 21,635 were sentenced under Drug Trafficking (§ 2D1.1). Of these, 15,195 offenders did not receive the safety valve adjustment. Of these, 909 cases were excluded because the reason why they did not receive the safety valve could not be determined. 1999 DATAFILE, *supra* note 77.

Table 18

Reasons Drug Trafficking Offenders Did Not Receive the Safety Valve Adjustment[135]

Reasons	N	%
TOTAL	14,286	100.0
Received Aggravating Role Adjustment	312	2.2
Did Not Receive Acceptance of Responsibility	317	2.2
Base Offense Level Less Than 26	3,349	23.4
Received Obstruction of Justice Adjustment	24	0.2
Bodily Injury was Involved in Offense	1	0.0
Multiple Reasons	5,556	38.9

Finally, of those defendants otherwise eligible for the safety valve—those meeting each of the required criteria on paper—4,720 received the safety valve at sentencing, while 909 did not. As can be expected, 14,286 of those defendants not qualifying for the safety valve did not receive it. What is odd, however, is that 333 defendants who did not appear to qualify for the safety valve, nevertheless received it. This apparent anomaly warrants further investigation.

Table 19

Safety Valve and Eligibility Status for Drug Trafficking Offenders[136]

Eligibility Status	Received Safety Valve		No Safety Valve	
	N	%	N	%
TOTAL	5,053	100.0	15,195	100.0
Eligible	4,720	93.4	909	6.0
Ineligible	333	6.6	14,286	94.0

IV. Policy Considerations

A. *Criminal History and its Discontents: The Judiciary's View*

Criticisms of the present construction of criminal history are neither new, nor confined to the academic community. In a 1996 survey conducted by the Federal Judicial Center ("FJC"), federal district court judges had the opportunity to weigh in on, among other things,

[136] Of the 55,557 cases, 21,635 were sentenced under Drug Trafficking (§ 2D1.1). Of these, 1387 cases were excluded due to missing information on safety valve status (1387). Eligibility status required that the offender have all of the following requirements: be in Criminal History Category I, not have a weapon SOC or 18 U.S.C. § 924 conviction, not have an aggravating role adjustment, receive the acceptance of responsibility adjustment, have a base offense level of at least 26, not receive the obstruction of justice adjustment, and not receive any adjustments for bodily injury. 1999 Datafile, *supra* note 77.

the construction of the criminal history categories.[137] While the survey instrument itself did not permit judges to comment expressly on the structure of Criminal History Category I, it did allow judges to comment on some important foundational elements.[138] For example, the judges strongly indicated that the assignment of criminal history points should rely more on the prior offense's nature rather than solely upon its sentence length (89.9% agreement) and that the existence of prior violence should be accorded more weight in criminal history scoring (94.3% agreement).[139] Indeed, the judges appeared to have concerns that the guidelines failed adequately to address violent acts in a defendant's past. Only 37.0% of district judges agreed that the criminal history score satisfactorily distinguishes between violent and nonviolent offenders.[140] A majority (64.4%) of these same judges observed that the criminal history scores for offenders with violent prior offenses are appropriate.[141] Although the judges generally concurred that the criminal history scores were appropriate for nonviolent offenses (68.2% agreement), they felt that prior misdemeanor and other minor offenses have a disproportionate effect on determining the proper criminal history category (61.6% agreement).[142]

In addition, it can be inferred that district court judges have expressed dissatisfaction with criminal history scores by exercising their discretion to depart from the guideline range. In fiscal year 1999, district judges cited "adequacy of criminal history" as a reason for departure in 40.7% of upward departure cases—suggesting that the guidelines did not adequately reflect the seriousness of the defendant's criminal record.[143] Pertinent to this article, the judges similarly identified the "adequacy of criminal history" as the reason in 11.5% of the downward departure cases—thus indicating that in those cases the defendant's criminal past was given too much weight.[144]

Judges are not the only players in the criminal justice system that have taken issue with the current structure of criminal history categories. Probation officers, those individuals who are tasked with assembling the pre-sentence report and taking the first swipe at calculating

---

[137] MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE UNITED STATES SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 23, 95–97 (1997).

[138] *Id.* at 40.

[139] *Id.* at 95.

[140] *Id.* at 96.

[141] *Id.*

[142] JOHNSON & GILBERT, *supra* note 137, at 96–97.

[143] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 36, § 4A1.3.

[144] *Id.*

the guidelines score, have observed that the current criminal history methodology is of "questionable value in measuring dangerousness and risk of recidivism."[145] In the 1996 FJC survey, probation officers agreed (82.0%) that prior violence should be given more weight in criminal history.[146] And, compared to district court judges, probation officers were even less likely to agree (29.2%) that the criminal history score adequately distinguishes between violent and non-violent offenders.[147]

While the attitude of these important players in the criminal justice system reflects only their day-to-day working impressions of the criminal history categories' effectiveness, they do suggest that, in the field, there is some concern as to whether the categories are working as intended.

B. *Policy Directions*

One of the more significant difficulties posed by the present configuration of the criminal history categories is that they are (and were) not based on any empirical study relating either to the predictive power of certain scored prior crimes or a survey of the public's feelings concerning "just deserts." As a result, the categories simply represent a compromise among the original Sentencing Commissioners as to how certain interests might best be balanced. Nevertheless, the Commission did initially indicate a desire to conduct research on the criminal history categories' predictive power:

> The Commission has developed a data base that will allow testing of the predictive power of the criminal history score in the near future. The Commission intends to conduct research that will examine predictive power using various measures of recidivism, and the extent of the crime-control benefits derived from increasing sentences in relation to the criminal history score. In addition, it will consider research relating to other possible predictors of recidivism. Such research will enable the Commission to assess the efficacy and desirability of modification of the criminal history score

---

[145] Caryl A. Ricca, *Simplification of Chapter Four: Comments From the Probation Officers Advisory Group to the U.S. Sentencing Commission*, 9 FED. SENTENCING REP. 209, 212 (1997).

[146] JOHNSON & GILBERT, *supra* note 137, at 95.

[147] *Id.* at 96.

> and/or modification of the degree to which it affects the guideline sentences.[148]

Unfortunately, this research has yet to be done.[149] Until such research is completed, it will be difficult to make significant changes to the calibration of criminal history scores.[150] That research is vital to carry out Congress' directive to the Sentencing Commission to structure the guidelines so as to "reflect, . . . advancement in knowledge of human behavior as it relates to the criminal justice process."[151] Regardless, even without this foundational research, we can perhaps make distinctions on the basis of what we do know and recommend areas that ought to be explored to better achieve the sentencing guidelines' purposes as outlined by Congress.

1. Consideration for "True" First-Time Offenders

A basic problem with Criminal History Category I is that it treats a wide range of defendants similarly despite the fact that they have disparate levels of previous contact with the criminal justice system. Defendants who have no previous contact of any kind—no prior arrests, no pending charges, no dismissed charges, no prior convictions—with any criminal justice system are lumped into the same

---

[148] U.S. SENTENCING COMMISSION, *supra* note 28, at 362.

[149] As an illustration of this lack of an empirical basis, it is interesting to compare the SFS and the criminal history categories. Consider two co-defendants convicted of securities fraud. Defendant A served two prior concurrent prison sentences resulting from two residential burglary convictions that were deemed related. Defendant B served one prior prison sentence of the same length resulting from conviction on one count of residential burglary. Under the SFS and the original CHS, both defendants would have the same score. The Sentencing Commission, however, revised the guidelines because it was concerned that offenders were not receiving added punishment when prior "related" violent offenses were grouped together. The Commission did not base its decision on the basis of any empirical evidence that these defendants posed a significantly different risk of recidivism. The Parole Commission, by contrast, has approached this same type of problem by first determining whether there was empirical evidence of added predictive power.

[150] The Department of Justice recently undertook a recidivism study to examine the impact of expanding the safety valve to offenders who have up to three criminal history points and to offenders who fall below offense level twenty-six. The study concluded that extending the safety valve's benefits to offenders meeting either of these two criteria would not pose a substantial risk to public safety and would result in significant cost savings for the Bureau of Prisons (in terms of prison expenditures). Despite the study's potentially flawed methodology and use of biased sample populations, it is at least a start to answering some of the questions posed by the predictive power of the criminal history categories. U.S. DEPT. OF JUSTICE, OFFICE OF RESEARCH AND EVALUATION, EXAMINATION OF RECIDIVISM RATES AND EXPANSION OF THE "SAFETY VALVE" (2000).

[151] 28 U.S.C. § 991(b)(1)(C)(1994).

criminal history category as those defendants who have at least one prior conviction or defendants who have convictions excluded under the guidelines for reasons such as the age of the conviction or the minor nature of the offense. If one accepts the premise that these *true* first-time offenders ought not to be treated similarly, at least in terms of criminal history, then Category I would appear to be in need of a facelift.

Congress would seem to agree with this assessment because in 28 U.S.C. § 994(j), it directed the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[152] By failing to incorporate a proper first-time offender category in the guidelines, the Commission may not have adequately addressed this statutory directive.[153]

In a limited way, defendants have gamely tried to implement Congress' instruction by encouraging courts to make downward departures on the basis of first-time offender status. However, their efforts ground to a halt in the wake of *Koon v. United States*.[154] In *Koon*, the United States Supreme Court concluded that a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history is inappropriate.[155] The Court observed that Criminal History Category I is expressly designed to accommodate first-time offenders who have (arguably) the lowest risk of recidivism.[156] As a consequence, the Court reasoned, a departure on the basis of first-time offender status can *never* be appropriate because the Sentencing Commission had taken this status into account in designing the criminal history categories.[157] Thus, the

---

[152] 28 U.S.C. § 994(j) (1994).

[153] In 1991, a criminal history working group investigated this issue (as well as the possible addition of a seventh criminal history category). The group recommended several amendment options designed to address this issue, but the Sentencing Commission took no action at that time. *See* United States v. White, 869 F.2d 822, 827 (5th Cir. 1989). The Commission's compliance with this directive, however, has been challenged in a number of cases and uniformly rejected. *See, e.g.*, United States v. Lueddeke, 908 F.2d 230, 232–33 (7th Cir. 1990); United States v. Ortez, 902 F.2d 61, 65–66 (D.C. Cir. 1990).

[154] *See* 518 U.S. 81, 111 (1996).

[155] *See id.*

[156] *See id.*

[157] *Id.* at 111. Indeed, before the Supreme Court's decision in *Koon*, the circuit courts of appeals had largely similarly rejected downward departures on the basis of the inadequacy of the criminal history categories. Because the Sentencing Commission expressly weighed a defendant's prior criminal conduct and thus fashioned the criminal history

likelihood of petitioners' recidivism was not itself appropriate to consider as a separate basis for departure.

As a result, the creation of a first-time offender category would need to be done either at Congress' behest, or by the Sentencing Commission itself. The Commission could easily do this either by adopting some sort of a guided downward departure that would permit district court judges to depart provided certain criteria were met, or by creating a new Criminal History Category I for defendants with no known prior convictions. While such an approach would doubtlessly result in false positives—for example, some individuals may have unrecorded juvenile or foreign convictions—that problem standing alone should not be a distraction. After all, we traditionally grant defendants the benefit of the doubt in numerous legal circumstances. The fact that not every prior conviction is properly recorded should not necessarily count against the defendant.

The difficulty with such an approach, however, would be that the statutory mandatory minimum would continue to trump any downward departure or adjustment the Sentencing Commission might adopt. Congress could thus expand, or otherwise modify the safety valve provision contained in the 1994 Crime Control Act. The Department of Justice recently undertook a limited recidivism study to examine the impact of expanding the safety valve to offenders who have up to three criminal history points and/or to offenders who fall below offense level twenty-six. The study concluded that extending the safety valve's benefits to offenders meeting either of these two criteria would not pose a substantial risk to public safety and would result in significant cost savings for the Bureau of Prisons. Despite the study's use of somewhat biased sample populations, it does suggest that—at least with respect to recidivism—extending the safety valve's reach will not adversely affect public safety.[158] While Congress would have to legislatively alter the safety valve's application to offenders in other than Criminal History Category I, the Sentencing Commission could choose to extend the safety valve's benefits to those falling below the offense level twenty-six floor.

---

categories to provide leniency to defendants without prior criminal records, courts deemed it inappropriate to grant departures on this basis. *See, e.g.*, United States v. Talk, 158 F.3d 1064, 1072–73 (10th Cir. 1998); United States v. Wind, 128 F.3d 1276, 1278 (8th Cir. 1997); United States v. Polanco, 53 F.3d 893, 898 (8th Cir. 1995); United States v. Ardoin, 19 F.3d 177, 181–82 (5th Cir. 1994); United States v. Berlier, 948 F.2d 1093, 1095 (9th Cir. 1991).

[158] U.S. DEPT. OF JUSTICE, *supra* note 150.

2. Violent Offenses

A more sweeping change to criminal history categories that would affect not merely first-time offenders, but also those at the top of the criminal history scale, would be to change the criminal history calculation to a prior offense of conviction typography system in which each criminal history category would represent a different "type" of prior record. Under such a system, the least serious category would be reserved for defendants with no prior violent felonies. Each additional category would be based upon an increasing number of violent offenses. Category I would thus be reserved exclusively for those offenders with no prior recorded convictions.

The consideration of a prior offense's relative severity—based upon a "violence" index—would have the advantage of focusing resources on dangerous offenders. Although there are variations in how violence is included in the sentencing calculation, nearly every extant sentencing guideline system considers the severity of a defendant's prior crimes in the determination of the sentence for a present offense. Minnesota, for example, assigns prior felony offenses from one-half to two points depending upon the offense's "severity level."[159] Pennsylvania's most serious category of prior convictions includes murder, voluntary manslaughter, kidnapping, rape, involuntary deviant intercourse, arson, and robbery.[160] Convictions for these offenses receive four points, the maximum amount assessable for a prior conviction. Similarly, in Oregon, criminal history is categorized by prior offense type—specifically violent versus non-violent offenses.[161] Other systems use prior record categories that rely less on numerical scores and instead differentiate among types of offenders, such as those with violent prior convictions or those with multiple felony convictions (a common proxy for severity).[162]

A variation on this approach might be for the Sentencing Commission to alter the current method of assessing criminal history points from the length of sentence imposed to an offense-based system. This system could be accomplished in a variety of ways, such as categorizing offenses on the basis of misdemeanor versus felony, nonviolent versus violent, or by using an offense severity scale such as the

---

[159] *See* MINN. SENTENCING GUIDELINES, II.B.1.a.

[160] *See* 9 FED. SENT. R. 216, sec. IV (1997).

[161] *See* Kirkpatrick, *supra* note 34, at 706.

[162] *See id.*

SFS. Indeed, the SFS has long been used by the Parole Commission as a reliable means of predicting recidivism.

It has been demonstrated that dangerousness levels of prior convictions are inconsistent with the guidelines' current point assignment system, which is based solely on prior sentence length.[163] Prior sentence length, however, may not directly correlate with the nature of the offense.[164] Certain state sentencing systems[165] have developed fairly sophisticated methods of determining prior offense seriousness that do not rely exclusively upon previous sentence length.[166] The rich information collected by parole officers in constructing the presentencing reports could be an invaluable aid in determining the nature of an offense.

Under either of these variations, the Sentencing Commission could consider assigning additional points for pre-determined violent offenses, but at the same time refuse to ignore convictions that are older, were committed when the defendant was a juvenile, or otherwise fall into any of the major exclusion categories (provided the previous offenses are violent in nature). Similarly, the Commission ought to determine whether certain non-violent misdemeanors (or certain felonies) ought to be eliminated from the criminal history calculation. Certain traffic offenses, such as driving while intoxicated, are often cited as examples of offenses that may not merit criminal history points. While, at first blush, this makes a certain amount of intuitive sense, the Commission would need to determine whether those offenses were in any way predictive of recidivist behavior.

3. Repeated Offenses

The Sentencing Commission could also choose to provide extra points for each repeat offense the defendant commits. This would remove certain offenders from Criminal History Category I. Thus, a defendant who had already committed a fraud before might, on a subsequent fraud conviction, be assigned additional points. Under this scenario, the Commission would consider prior offenses regardless of whether they qualify for exclusion under the present criteria.

---

[163] Maxfield & Tarpley, *supra* note 105. That study demonstrates that sentence length alone is not always highly correlated with offense severity.

[164] *Id.*

[165] Notably Kansas, Michigan, Minnesota, Oregon, and Pennsylvania. *See* Kirpatrick, *supra* note 34, at 681.

[166] Julian V. Roberts, *Refining the Criminal History Guidelines: A Few Lessons from the States*, 9 FED. SENTENCING REP. 213, 213–14 (1997).

The central issue would always be whether the offenses are predictive of future criminal conduct or whether they make the defendant more culpable. Professor Von Hirsch has explained that: "The reason for treating the first offense as less serious is . . . that repetition alters the degree of culpability that may be ascribed to the offender. . . . A repetition of the offense following that conviction may be regarded as more culpable."[167]

One may disagree that a repeated offense—if otherwise not predictive of future criminality—makes an offender more culpable, hence more deserving of punishment, but this is certainly a commonly held belief.[168] The Sentencing Commission expressly made this "increased culpability" upon the basis of a prior, similar offense an explicit consideration in creating the criminal history categories. Certainly, as an intuitive matter, it may make at least some difference that an individual has previously engaged in criminal conduct that is similar to the present offense of conviction. Questions of notice and culpability doubtless cut against the defendant at that point. As with each of these circumstances, however, more research needs to be undertaken.

Conclusion

The question of whether to treat first-time or low-level offenders differently from those with more ambitious criminal histories is one legal policymakers have been debating for some time. While the general impulse is to treat such offenders differently, it is important to differentiate between true first-time offenders and those who may have prior convictions that, under current practice, may be excluded from the criminal history score. Similarly, consideration should be given to including present excludable prior convictions that contain any elements of dangerousness or that may be predictive of future criminality. In the same vein, thought might be given to including otherwise excludable convictions if they are of the same general nature as the defendant's present offense. Regardless, more empirical research is needed to determine whether these convictions have any predictive power. It may well prove that certain minor convictions, which presently are scored, ought to be excluded, but that other excluded crimes ought to be included in the calculation. Congress has

---

[167] Von Hirsch, *supra* note 25, at 85.

[168] Doubtless Congress would agree with this understanding. *See, e.g.*, H.R. Rep. No. 99-523-44, at 99 (1984).

directed the Sentencing Commission "to permit individualized sentences when warranted,"[169] to "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process"[170] and to "develop means of measuring the degree to which . . . sentencing . . . practices are effective in meeting the purposes of sentencing."[171] In light of years-long experience with criminal history categories and the development of more sophisticated analytical devices, the Sentencing Commission should undertake to fulfill Congress' will.

[169] 28 U.S.C. § 991(b)(1)(B) (1994).
[170] 28 U.S.C. § 991(b)(1)(C) (1994).
[171] 28 U.S.C. § 991(b)(2) (1994).